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COMPENDIUM

AND *Levi Lincoln*

DIGEST OF THE LAWS

OF

MASSACHUSETTS.

BY WILLIAM CHARLES WHITE,  
Counsellor at Law.

"MISERA SERVITUS EST, UBI JUS EST VAGUM, AUT INCOGNITUM."

VOL. III....PART II.

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**DISTRICT OF MASSACHUSETTS, TO WIT:**

BE it remembered, That on the twenty-fourth day of October in the thirty-fifth year of the Independence of the United States of America, WILLIAM CHARLES WHITE, of the said district, has deposited in this office the title of a book, the right whereof he claims as author, in the words following, to wit:

**"A COMPENDIUM and DIGEST of the LAWS OF MASSACHUSETTS, By WILLIAM CHARLES WHITE, Counsellor at law. " Misera servitus est, ubi jus est vagum, aut incognitum." Vol. III...Part. II.**

In conformity to the act of the Congress of the United States, intituled, "An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of such copies, during the times therein mentioned;" and also to an act intituled, "An act supplementary to an act, intituled, an act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies during the times therein mentioned; and extending the benefits thereof to the Arts of Designing, Engraving, and Etching Historical, and other Prints."

WILLIAM S. SHAW,  
Clerk of the District of Massachusetts.

# DIGEST

OF THE

## LAWS OF MASSACHUSETTS.

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### TITLE CXVI.

### PLEADING.

**P**LEADINGS in general, signify the allegations of the parties to suits, when they are put into a proper and legal form ; and are distinguished, in respect to the order of pleading them, by the names of declarations or counts, avowries or cognizances, pleas, replications, rejoinders, surrejoinders, rebutters, surrebutters, &c. ; to which may be added, demurrers, and joinders in demurrer.

1. Of the several divisions of pleading.
2. Of the declaration.
3. Ofoyer.
4. The general requisites of pleas.
5. Of the general issue.
6. Of traverse.
7. Of pleas in avoidance.
8. Of pleas in discharge.
9. Of pleas in excuse.
10. Of pleas in justification.
11. Of pleas in estoppel.
12. Of pleading double.
13. Of the protestation.

14. Of replications.
15. Of discontinuance.
16. Of departure.
17. Of new assignments.
18. Of demurrers.
19. Of surplusage.
20. Of affirmative and negative pregnant.
21. Of immaterial issues.
22. Of repleader.
23. Of pleas *puis darrein continuance*.
24. Of arrests of judgment.
25. Of pleading in criminal cases.(1)

#### I. Of the several divisions of pleading.

Declaration and  
count  
Lawes' Plead. 35.  
Doctr. Plead. 83.

1. The declaration signifies that part of the pleadings, in which the plaintiff declares or states his complaint, or cause of action, against the defendant. In real actions, that part of the pleadings, in which the demandant makes his claim or complaint, is properly called a count.

Avowry and cogni-  
zance.  
Lawes' Plead. 35.

2. An avowry is where the defendant, in an action of replevin, avows the taking of the distress in his own right, or in right of his wife, and sets forth the cause of it. If the defendant was not entitled to take the property in his own right, or the right of his wife, but in right of another as his bailiff or servant, then he is said to make cognizance; that is, he acknowledges the taking, and insists that such taking was legal, not because he himself had the right, on his own account, but by command of another who had the right.

Plea.  
Ibid. 36.

3. The plea signifies the answer to the plaintiff's declaration, or the plaintiff's answer to the defendant's avowry or cognizance.

Ibid.

Bac. Abr. tit. Pleas  
and Pleading. A.

Pleas are variously distinguished; but the most general division of them is into dilatory and peremptory, the latter of which are mostly called pleas in bar.

(1) For further information on this subject, See TITLE ABATE-  
MENT.

Dilatory pleas are such as tend merely to delay or put off the suit, by questioning the propriety of the remedy, rather than by answering the complaint. Peremptory pleas or pleas in bar answer to the merits, and in general put a final end to the action, so that it cannot be afterwards prosecuted, or any other action brought for the same cause.

Lawes' Plead. 36.

3 Bl. Com. 303.

Dilatory pleas are, 1. To the jurisdiction of the court : 2. To the person : 3. To the writ.

Dilatory pleas.  
Lawes' Plead. 36, 37.

Peremptory pleas, or pleas in bar, are generally divided into two sorts ; first, in denial of the declaration ; and secondly, in confession and avoidance of it. To these may be added pleas by way of *estoppel* ; which shew that the plaintiff has done some act which estops or precludes him from relying upon the facts stated in his declaration, because it is contrary to, or inconsistent with those facts.

Peremptory pleas.  
Lawes' Plead. 37.  
3 Bl. Com. 303, 308.

Bar legally signifies a perpetual destruction, or a temporary taking away of the action of him who sues, and every plea, wherein any matter in bar is pleaded, is called a plea in bar ; which is perpetual, or temporary.

Bar.  
Lawes' Plead. 37.

After the plea, follows the replication, which is the answer made by the plaintiff to the defendant's plea. In the replication, or any of the subsequent pleadings, either party may plead in denial or avoidance, &c. according to the nature of the previous pleading, or the matter to be offered in answer to it.

Replication.  
Ibid. 41.

Next in order is the rejoinder ; which is the answer of the defendant to the plaintiff's replication.

Rejoinder.  
Ibid.

The rejoinder is followed by the surrejoinder ; which is the plaintiff's answer upon the defendant's rejoinder, and like a second defence, as the replication is said to be the first defence of the plaintiff's declaration.

Surrejoinder.  
Ibid. 41, 42.

The rebutter is the next proceeding ; and signifies the defendant's answer to the plaintiff's surrejoinder.

Rebutters.  
Ibid. 42.

To the rebutter the plaintiff may again reply by a surrebutter, which may be called a third defence of the plaintiff's declaration.

Surrebutter.  
Ibid.

Issue.  
3 Bl. Com. 513.

When, in the course of pleading, the parties come to a point, which is affirmed on one side and denied on the other, they are then said to be at issue; all their debates being at last contracted into a single point, which must now be determined either in favour of the plaintiff, or of the defendant.

*Ibid.* 314.

Issue is the end of all the pleadings, and is either upon matter of *law*, or matter of *fact*.

Issue of fact.  
*Ibid.* 315.

An issue of fact is where the fact and not the law is disputed. And when he that denies or traverses the fact pleaded by his antagonist, has tendered the issue, thus, "and this he prays may be inquired of by the country;" or, "and of this he puts himself upon the country;" it may be immediately subjoined by the other party, "and the said A. B. doth the like." Which done, the issue is said to be joined, both parties having agreed to rest the fate of his cause upon the truth of the fact in question.

Issue in law.  
Demurrer.  
*Ibid.* 314.

An issue upon matter of law is called a *demurrer*: and it confesses the facts to be true, as stated by the opposite party; but denies that, by the law arising upon those facts, any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse; according to the party which first demurs.

Vin. Abr. tit. Pleading.  
Lawes' Plead. 43.

A demurrer is therefore said to be an irregular or collateral part of pleading; and whenever the counsel of either party is of opinion, that the declaration or plea of his adversary is insufficient in law, he demurs or relies on the law, and refers the same to the judgment of the court.

Joinder in demurrer.  
*Ibid.*  
Co. Lit. 71. b.

Now as there is no issue upon the fact, until it is joined between the parties, so there is no issue in law, but when they have joined or agreed upon it; and therefore, where a demurrer is offered by one party, the adverse party joins with him in demurrer, and the answer which he makes, is called a joinder in demurrer.

## II. Of the declaration.

The declaration states the plaintiff's case, viz. the injury which he has received, and for which he brings his action.

The narrative part of a declaration is three-fold, consisting, 1. Of inducement or conveyance to the principal matter of the action, which is called the substance or gist of it: 2. The substance or gist itself: and, 3. Matters collateral thereto.

Constituent parts of a declaration.  
Lawes' Plead. 66.

Inducement, in pleading, signifies the statement of matter which is introductory to the principal subject of the declaration, or plea, &c. but which is necessary to explain and elucidate it; and is in the nature of the preamble to an act of parliament, and leads on to the principal subject of the declaration or plea, &c. the same as that does to the purview or providing clause of the act.

Inducement.  
Ibid. 67.

Thus, in an action for a nuisance to property in the possession of the plaintiff, the circumstance of his being possessed of the property should be stated as inducement, or by way of introduction to the mention of the nuisance.

Ibid.

The substance or gist of the action, is the essential ground or object of it, in point of law, as the statement of the nuisance itself, in the case just alluded to.

Gist.  
Ibid.

In stating the substance or gist of the action, every thing must be averred which is necessary to be proved at the trial.

Ibid. 68.

Those matters which are collateral to, or independent of, the substance or gist of the action, are either matters of aggravation, or special damage.

Collateral matters.  
Ibid. 68, 69.

Matters of aggravation are such matters as aggravate the damages really sustained by the plaintiff, by shewing with what enormity the act which caused them was committed.

Matters of aggravation.  
Ibid. 70.

As if the plaintiff declares in trespass, for entering his house, and breaking open his closets, and tossing his goods about; the entry of the house is the principal

Ibid.

ground and foundation of the action, and the rest is only stated by way of aggravation, and need not be proved by the plaintiff or answered by the defendant.

3 Wils. 294.

Special damage.  
Lawes' Plead. 70.

Special damage, as distinguished from the gist of the action, signifies that special or particular damage which is stated to result from the gist; as if the plaintiff in an action of trespass were to state that, by means of the damage done to his house, he was obliged to seek a lodging elsewhere.

Ibid. 70, 71.

But, sometimes, the special damage is said to constitute the gist of the action itself; thus, in an action wherein the plaintiff declares for slanderous words, which, of themselves are not a sufficient ground or foundation for the suit; if any particular damage result to the plaintiff from the speaking of them, that damage is properly said to be the gist of the action.

Ibid. 71.

But whether the special damage be the gist of the action, or only collateral thereto, it must be particularly stated in the declaration; as the plaintiff will not otherwise be permitted to go into evidence of it at the trial, because the defendant cannot else be prepared to answer it.

Willes 23.

Lawes' Plead. 71.  
What certainty is re-  
quired in inducement  
and matters collate-  
ral.

In matters of inducement, and those which are collateral to the action, the same certainty of time and place, &c. is not necessary to be observed as in stating that, which is the ground and gist of it.

Ibid.  
2 Mod. 71.

Therefore, in an action upon the case for a nuisance, if the plaintiff, in his declaration, alleges that he was possessed of a term of years, it is sufficient, without shewing the commencement of the term; for the title is only inducement to the action.

Lawes' Plead. 72.

So if the plaintiff declare in trespass, for entering his house, breaking open his closets and chests, and tossing his goods about, it is not necessary to specify particularly the closets, chests or goods; for the breaking open of the closets, &c. is altogether collateral to the action, and stated merely to aggravate or increase the damages.

3 Wils. 292.

If the plaintiff have several causes of complaint of the same nature, which may be joined in the same action, he may declare for them all in the same declaration. And here it may be proper to observe, that each part of a declaration, which contains a separate cause of complaint, is called a *count*. This word, in real actions, signifies the whole declaration; because in those, it seldom consists of more than one count.

Several counts.  
Lawes' Plead. 72.

Count.

But in all personal actions, the general rule is, that the plaintiff may join as many counts as he pleases in the same declaration, though for different causes of action, provided they are causes of actions of the same sort; as assumpsit, debt, covenant, trespass or case.

Ibid.

1 Tidd. 10, 11.  
3d Edit.

The plaintiff is also at liberty, if he have but one cause of complaint, to set it forth in as many different shapes as he pleases, in different counts of the same declaration; so that if he fails in the proof of the one, he may succeed upon the other. But if several counts are put into the declaration for the purpose of vexation, the court will order them to be expunged, and make the plaintiff pay the costs.

Lawes' Plead. 73.  
3 Bl. Com. 395.

### III. Of oyer.

When the action is founded on a specialty, before the defendant states the nature of his case, he may crave oyer of it; which is, to pray or petition the court, that he may hear it read to him. Having obtained oyer of a specialty, the defendant is entitled to copy it in his plea.

Lawes' Plead. 96.  
3 Bl. Com. 299.

Oyer may be craved or demanded of any specialty, or other written instrument, as bonds of all sorts, deeds poll, indentures and the like, whereof a *profert in curiam* is necessarily made by the adverse party. But if that party be not bound to plead the specialty or instrument with a *profert*, and he pleads it with one, it is but surplusage, and the court will not compel him to give oyer of it.

Lawes' Plead. 96, 97.  
1 Salk. 497.

Lawes' Plead. 93, 99.  
 3 Str. 1241.  
 1 Wils. 97.  
 6 Mod. 28.

The party craving oyer is not, in general, bound to set out the specialty, &c. in his plea; but if he wish to take advantage of any insufficiency or illegality in it, or any variance, he must crave oyer, and set it forth. If the insufficiency appear upon the face of the specialty, &c. he may demur at once.

Lawes' Plead. 99.  
 Salk. 498.

If the party insist upon his right of oyer, and enter the prayer on record, his adversary may counterplead or demur to it; and though granting oyer where it ought not to be is no error, yet denying it, where it ought to be granted, is.

#### IV. The general requisites of pleas.

Lawes' Plead. 137.  
 3 Bl. Com. 308.

The condition and quality of pleas are first, that they be single, and contain only one matter, or ground of answer in each of them; secondly, that they be direct and positive, and not by way of recital or argumentative; thirdly, that they have convenient certainty of time, place, persons, and other circumstances; fourthly, that they answer the plaintiff's allegations in every material point; and lastly, that they be so pleaded as to be capable of trial.

#### V. Of the general issue.

Lawes' Plead. 110.

General issues directly deny the whole declaration; as in personal actions, where the defendant pleads, "he owes the plaintiff nothing," or "that he is not guilty of the facts alleged in the declaration;" or in real actions, where the tenant pleads "no wrong done," or "no disseizin committed." These pleas and the like are called general issues; because, by importing an absolute and general denial of all the matters alleged in the declaration, they, at once, put them all in issue.

Lawes' Plead. 111.

Anciently the general issue was seldom pleaded, except where the defendant meant wholly to deny the charge alleged against him; for when he meant to avoid or justify the charge, it was usual for him to set forth the particular ground of his defence in a special plea,

which was considered necessary to apprise the court and the plaintiff of the particular nature and circumstances of the defendant's case, and was originally intended to keep the *law* and the *fact* distinct. But now this ancient strictness is greatly relaxed, and the defendant is in many cases allowed to give the special matter in evidence under the general issue, where formerly, he was obliged specially to plead it.

By statute, in all civil actions triable before a justice of the peace, except such actions of trespass wherein the defendant means to avail himself, by pleading the title of himself, or any other person, under whom he claims, in justification of the trespass or trespasses alleged to be committed on real estate ; the defendant shall be entitled to all evidence under the general issue, which, by law, he might avail himself of under any special plea, in excuse or justification.

General issue before justices of the peace.

Stat. 1783, c. 42, s. 7.

So, by statute, executors, administrators and guardians shall not be compelled to plead specially to any action or suit at law, brought against them in such capacity ; but may, under the general issue, give any special matter in evidence.

General issue by executors and guardians.

Stat. 1783, c. 32, s. 2.

So in any information or action grounded on a penal statute, the defendant may avail himself of any special matter under the general issue.

Stat. 1783, c. 12, s. 5.

Furthermore, by statute, in all actions, wherein a justice of the peace, sheriff, deputy sheriff, or coroner, or a town, district, precinct or parish officer, or any other officer, civil or military, is sued for any thing done by him in the execution of his office, the defendant may plead the general issue, and give the special matter in evidence, upon filing in the cause a brief statement of such special matter, within such time as the court shall order ; of which statement the plaintiff shall be entitled to a copy, or he may plead specially at his election.

General issue by civil and military officers, and brief statement.

Stat. 1792, c. 41.

So in writs of *audita querela*, the respondent may, under the general issue of "not guilty," give any special matter in evidence.

*Audita querela.*

Stat. 1790, c. 47, s. 1.

Bull. N. P. 197.  
Cites Hob. 218.  
2 Mass. Rep. 521.

To an action founded on a penal statute, not guilty or *nil debet*, are good pleas. But in *Stilson v. Tobey*, Parsons, C. J. said, "that the old plea of *nil debet* was the safest, and that upon the plea of not guilty, if the jury find the defendant guilty, they ought also to find the forfeiture."

To personal actions, founded on torts, as trespass, slander, malicious prosecution, and the like, the general issue is not guilty.

In actions arising from contract, the general issue varies according to the nature of the action. In assumpsit it is "never promised" in debt "that defendant owes nothing," in covenant "*non est factum*, or that the deed declared on is not his deed," though this last plea is, more properly and technically speaking, a *common* issue, because it puts only the deed in issue, and not the breach of covenant. (1)

Selw. 457,  
Lawes' Plead. 117.  
Cites Hale's Anal.  
Law, s. 49.

#### VI. Of traverse.

Lawes' Plead. 117.

A traverse signifies to deny or controvert any thing which is alleged in the declaration, plea, replication, rejoinder, surrejoinder, &c.

*Ibid.*

All issues are traverses, although all traverses cannot be said to be issues; and the difference is this, issues are, where one or more facts are affirmed on one side, and directly and merely denied on the other; but special traverses are where the matter asserted by one party is not directly and merely denied or put in issue by the other, but he alleges some new matter or distinction inconsistent with what is previously stated, and then distinctly excludes the previous statement of his adversary. The new matter, so alleged, is called the inducement to the traverse, and the exclusion of the previous statement the traverse itself.

(1) In the action of covenant, it is said, there is, properly speaking, no general issue, or plea, which puts the plaintiff on proof of the whole declaration. Lawes' Plead. 113, cites Tidd, 593.

A special traverse is necessary when a particular statement is made by one party, and the other party pleads, or replies another statement repugnant to it, for else the pleadings would run to infinite prolixity ; but it is otherwise where the matter pleaded or replied is quite consistent with that previously alleged.

*Ibid.* 117, 118.  
1 Wils. 253.

So, in general, every matter which is the substance or gist of the plaintiff's action, or the defendant's defence, or is material thereto, is traversable ; but matters of inducement, and such as are not material to the action or defence, cannot be traversed.

Lawes' Plead. 118.

It is another general rule, that a special traverse must have a proper and sufficient inducement ; for if there be no inducement to a special traverse, the issue will be a negative pregnant. And if the defendant, on traversing the plaintiff's title, shews a defective one in himself, or the person under whom he claims, his plea will be bad.

*Ibid.*

So a man cannot make that part of his plea, which is an answer to part of the declaration, an inducement to a traverse of the residue of the declaration. But inducement to a traverse does not, in general, require so much certainty as is requisite in other cases, because it is not itself traversable.

*Ibid.*  
Com. Dig. tit. Plead. G. 20.

The most usual and proper words of a special traverse are, "*without this*," or, as it is expressed in the old latin entries, "*absque hoc* ;" certainly these words "*without this*" are calculated to convey the most pointed denial, by putting, as it were, the matter denied out of the plea. But any other words which are equivalent to the above, and import an express denial or exclusion of the matter intended to be traversed, are sufficient ; and, therefore, a traverse by the words, "*et non*," is good.

Lawes' Plead. 119.  
Com. Dig. tit. Plead. G. 1.

As if the defendant pleads, that A was taken into custody by a warrant, returnable one day, "*and not*" by a warrant returnable at another day, it is a good traverse of his having been taken under the warrant returnable on the latter day.

Lawes' Plead. 119.  
120.  
Saund. 23.

**Lawes' Plead. 130.** Yet a traverse ought to be by express words and not argumentative ; for an argumentative traverse is bad.

**Ibid. 131.** A special traverse must not be concluded to the country, but with a verification ; for, in the first place, it contains new matter ; secondly, it does not amount to an issue upon any matter previously alleged ; and, thirdly, it is in the negative, and though it may be applied to a previous affirmative, yet the affirmative is not denied in the same sense or manner in which it was alleged ; but the traverse being regulated by the inducement to it, limits and alters the way in which the original allegation would otherwise have been tried.

**Ibid.**  
**2 D and E. 439.**  
**3 Burr. 1022.**

**Lawes' Plead. 121.** And although, where an affirmative and negative are applied to the same thing, or only differ with respect to the additional identity contained in either, the traverse may be concluded to the country, or with a verification ; it seems to be otherwise where the affirmative and negative are made in different senses, and with a view to different facts : in which latter cases only, a special traverse can be said to be necessary.

#### VII. Of pleas in avoidance.

**Ibid. 122.**

Pleas in avoidance are such as confess the matters contained in the declaration, and avoid the effect of them by some new matters, which shews, that the plaintiff is not entitled to maintain his action ; as by admitting the contract declared upon, but shewing it was void or voidable, on account of the inability of one of the parties to make it, as by coverture, infancy, or the like ; or by the mode in which the contract was executed, as by duress ; or that it was contrary to law, as being within the statutes against usury or gaming ; which circumstances are sufficient to prevent the plaintiff from recovering any thing.

#### VIII. Of pleas in discharge.

**Ibid. 122, 123.**

Pleas in discharge, as distinguished from those in avoidance, are such as admit the demand, but instead of

avoiding the payment or satisfaction of it, shew that it has been discharged by some matter of fact, as by having been actually paid or satisfied ; or, that it has been ascertained and settled by legal means, though it may not have been paid or satisfied, and may yet remain to be so, as by having been made the subject of a reference, foreign attachment, or former recovery ; or that the plaintiff has given up his right to claim the demand by a release, or the like.

### IX. Of pleas in excuse.

Pleas in excuse also admit the demand or complaint stated in the declaration, but excuse the non-compliance with the plaintiff's claim, or the commission of the act of which he complains, on account of the defendant's having done all in his power to satisfy the former, or not having been the culpable author of the latter. Ibid. 123.

Thus where after tender of the debt by the debtor and refusal by the creditor, if the latter harrasses the former with an action, it becomes necessary for the defendant to acknowledge the debt and plead the tender, adding " that he has always been, and still is, ready to pay it ;" for a tender and refusal of a debt will, in all cases, discharge the costs of the action, though not the debt itself. Ibid. 127, 128.  
3 Bl. Com. 302.

So where an action is brought for an assault and battery, the defendant may plead, that the plaintiff gave the first assault, which obliged him to defend himself, and that if any injury happened to the plaintiff from such defence, the same was occasioned by his own assault first made upon the defendant ; which is called a plea of *son assault demesne*.(2) Lawyer's Plead. 124.  
3 Bl. Com. 303.

### X. Of pleas in justification.

Pleas of justification differ from those last mentioned in this respect, that the defendant in those pleas always Lawyer's Plead. 125.  
126.

(2) Query, if *son assault demesne* is not a plea in justification, and not merely in excuse.

relies upon the plaintiff's conduct, as an apology for his doing or omitting to do the thing in question; but in pleas of justification, the defendant professes purposely to have done the acts which are the subject of the plaintiff's suit, not on account of his negligent or culpable conduct, but in order to exercise that right which he considers he might in point of law exercise, and in the exercise of which he conceives himself not merely excused but justified. In short, such pleas proceed upon the idea that he acted not merely without blame, but by legal and established right.

Ibid. 136.

Grounds of justification seem principally to consist of matter of title or interest in or respecting land; or matter of authority, either mediately or immediately derived from the plaintiff; or the general operation of law upon the particular circumstances of the case.

#### XI. Of pleas in estoppel.

Ibid. 137.

Pleas in estoppel happen when the plaintiff has done some act, or executed some deed, or been party to some record, which estops or precludes him from averring any thing to the contrary of it.

Ibid.

2 Bl. Com. 298.

The execution of a deed is said to be the most solemn and authentic act that a man can of himself possibly perform in the disposal of his property; and therefore, he shall always be estopped by his own deed; or, in other words, he shall not be permitted to aver or prove any thing in contradiction to that which is contained in it.

Lawes' Plead. 140, 141.

In pleading matters in estoppel it is usual for the defendant, at the beginning of his plea, to say that the plaintiff ought not to be admitted to allege the facts, on which he relies, and which he is precluded from asserting, by reason of his having done some act inconsistent with them, instead of saying *actionem*, or *onerari non*.

#### XII. Of pleading double.

Ibid. 131, 132.

At common law, the defendant could only have pleaded one single matter to the whole declaration; which

rigour often abridged the justice of his defence, and was, doubtless, one cause of perplexed inartificial pleading; the party endeavouring to crowd as much reasoning into his plea, however intricate, repugnant, and contradictory, he made it by so doing.

But even at common law, the defendant might have pleaded several matters to different parts of the declaration; as not guilty to part of the declaration, and to another part, a justification, or release, &c. and where there were several defendants, each of them might have pleaded a single matter to the whole, or several matters to different parts of the declaration. Ibid. 132.

And now by the statute for the amendment of the law, Ibid. the defendant or tenant, in any action or suit, or any plaintiff in replevin, may with the leave of the court plead as many several matters thereto, as he shall think necessary for his defence.(3).

### XIII. Of the protestation.

If any matter be alleged by the plaintiff in his declaration, upon which the defendant cannot join issue, he must protest against it in his plea; otherwise it will stand admitted against him, in another action. Ibid. 141.

A protestation, or, as it is called in pleading, a *protestando*, has been defined to be a saving to the party who takes it, from being concluded by any matter alleged or objected against him, upon which he cannot join issue; and it is no more than an exclusion of a conclusion; for it merely prevents the effects of such allegations, in another action. Ibid.

Either party, plaintiff or defendant, may make protestation; and that in a plea, replication, rejoinder, surrejoinders, rebutter, or surrebutter. If it be not made when it ought, the party would be concluded by it, though the issue be found in his favour. 3 Mod. 136.  
Lit. s. 192.  
Lawes' Plead. 141.

(3) 4 Ann. c. 16, s. 4, 5.

Ibid.

Howd. Com. 276. b.

But matter on which issue may be joined, whether it be the gist of the action or plea, &c. cannot be taken by protestation ; although a man may take by protestation matter that he cannot plead, as in an action for taking goods of the value of *five pounds*, the defendant may make protestation that they were not worth more than *3s. 4d.*

Lawes' Plead. 142.

It is obvious that protestation, repugnant to, or inconsistent with the gist of the plea, &c. cannot be of any benefit to the party making it. So it is idle and superfluous, to make protestation of the same thing that is traversed by the plea, or of any fact which must necessarily depend upon another fact protested against ; as to protest both that A made no will, and that he made no executors, which he could not do, if there was no will.

#### XIV. Of replications.

Ibid. 147.

If the defendant's plea contains a direct contradiction of the declaration, and concludes with referring the matter to be tried by a jury of the country, the plaintiff must do so too : that is, he must submit the matter to be tried by a jury, without offering any new answer to it, and must stand or fall by his declaration ; in which case, he merely replies, that as the defendant has put himself upon the country, that is, has submitted his cause to be tried by a jury of the country, he the plaintiff doth so likewise, or the like.

Ibid. 148, 149.

When the plea of the defendant does not amount to an issue, or direct contradiction of the declaration, but is collateral to it, the plaintiff may plead again, and reply to the defendant's plea, either by taking issue upon a special traverse taken in the plea ; or by directly denying or traversing the plea ; or by alleging some new matter in contradiction of the matter contained in it ; or by confessing and avoiding it, by some new circumstance or distinction, consistent with the declaration ; or by concluding the defendant from pleading the matter contained in the plea, by some matter of estoppel.

After a special traverse, that not being a direct denial of matter previously alleged; and therefore not constituting an issue of itself; the party whose pleading is traversed, offers an issue on the traverse, that is, insists upon his original allegation, in the manner he at first made it, and thereby puts in issue the real question to be tried. Ibid. 149.

So the plaintiff may, in his replication directly deny, or specially traverse, the new matter alleged in the plea; as where the defendant, in an action on a contract, pleads that it was void by the statute made against gaming: the plaintiff, in his replication, may either directly deny that allegation, or specially state by way of inducement, that the money was due fairly, and then specially traverse the allegation in the defendant's plea, that it was won by gaming. Ibid.

The plaintiff in his replication, instead of traversing, or immediately denying the defendant's plea, may allege some new matter in contradiction of it; as if the defendant, in an action on an arbitration bond, pleads that no award was made, the plaintiff, in his replication, may set forth an actual award, and assign a breach of it. Ibid. 150.

So the replication may confess and avoid the plea, by some new matter or distinction consistent with the plaintiff's declaration; as in an action for trespassing on the plaintiff's land, if the defendant shews a title to the land by descent, under which he claims a right to enter, and gives colour to the plaintiff, the latter may deny or traverse the fact of the descent, or confess and avoid it, by replying, that after it took place, the defendant himself demised the lands to the plaintiff for term of life. 3 Bl. Com. 310.

#### XV. Of discontinuance.

It is a general rule, that the plaintiff must follow up his entire demand, throughout the whole of the suit; and if any part of it be discontinued in the pleadings, it is a discontinuance as to the whole: for there does not con- Lawes' Plead. 161.

tinue to be the same demand which the plaintiff set forth in his declaration.

*Ibid.* 161, 162.

And this rule applies not only as to the subject matter of the cause, but also as to the parties; and therefore, if the plaintiff declares against three defendants, and a plea is pleaded by two of them only, to which the plaintiff replies, without taking any notice of the third defendant, on demurrer to this replication, the action being discontinued, judgment must be given against the plaintiff, though the defendant's plea were bad.

1 Bos. and Pol. 411.

*Lawes' Plead.* 162.

But it is absurd to say, that the defendant can discontinue the plaintiff's action by putting in a defective plea, although if the plaintiff, in his replication, omit to reply to any part of the plea, he may discontinue his own suit; and therefore, if there be in fact a plea, though a defective one, the plaintiff ought, in all cases, to pray the opinion of the court upon it, which he can do no otherwise than by demurring.

*Willes*, 481.

#### XVI. Of departure.

*Lawes' Plead.* 162.

In the several stages of the pleading, it must be carefully observed, that neither party departs or varies from the case on which he has previously relied; for this, which is called a departure in pleading, might occasion endless altercation: therefore, the replication must support the declaration, and rejoinder must support the plea, &c. without departing or varying from it. The same rule applies to all the subsequent pleadings of either of the parties.

#### XVII. Of new assignments.

*Ibid.* 163.

In many actions, the plaintiff who has alleged in his declaration a general wrong, may, in his replication, after an evasive plea by the defendant, state the general wrong with more particular certainty; by assigning the injury anew, more particularly or circumstantially, so as clearly

to ascertain and identify it, consistently with his general complaint. This is called a new or novel assignment.

As if the plaintiff declares for a trespass in entering his close at a place called D. and the defendant pleads <sup>Ibid.</sup> 3 Bl. Com. 311. that the spot where the trespass was committed, is a certain close of pasture in D. describing it particularly, (as he may do) and that such close is his own freehold; the plaintiff may, in his replication, new assign or describe another close in D. specifying the abutments and boundaries of it, as the real place of the injury. And as the plaintiff may new assign the trespass in a different close, so he may new assign it in another part of the same close.

In all cases, the new assignment should be so certain and explicit, that the difference between the trespasses mentioned in the plea, and those newly assigned, may be easily perceived. <sup>Lawes' Plead. 163.</sup>

As where the defendant, either intentionally or by accident, mistakes the plaintiff's cause of action, the plaintiff is at liberty to vary from the defendant's plea in his new assignment; it is but fair that the defendant may plead *de novo* to it, which he is, therefore, allowed to do; just as he might have pleaded to the original declaration; that is, he may either deny it, by merely pleading not guilty to the trespasses newly assigned, or he may put in one or several special pleas of justification, &c. to the whole or part of those trespasses, with or without the plea of not guilty. <sup>Ibid. 165.</sup>

And if the plaintiff do not, in his new assignment, in express terms, exclude the application of the original pleas to the trespasses, newly described, the defendant may either repeat the pleas originally pleaded to the declaration, or introduce any new defence or defences upon the record. <sup>Ibid.</sup>

The pleadings, consequent upon a new assignment, are for the most part, the same, in substance and form, as those pleaded to the original declaration; but they, of <sup>Ibid.</sup>

course, must be expressly applied to the former, by allusion to the trespasses newly assigned, and the plea pleaded to those trespasses, or the replication to the plea so pleaded, in order to distinguish the new assignment and pleadings upon it, from the declaration and the pleadings thereon.

### XVIII. Of demurrers.

*Ibid.* 167.

Demurrers are general or special. The former contain a general objection to the previous pleading; the latter, (which were introduced by the statute 27 Eliz. c. 5.) specially shew the cause of objection.

*Ibid.* 167, 168.  
*Hob.* 232, 233.

At common law, a general demurrer confessed all facts formally pleaded; and before the statute of 27 Eliz. formal mistakes in the pleadings were sufficient, on a general demurrer. It was, therefore, enacted, by that statute, that after demurrer joined and entered, in any action, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection or want of form, except such as the party demurring shall, specially and particularly, set down and express together with his demurrer; and that judgment shall not be reversed for such imperfections, &c. except they be so set down. And by the second section of the statute, the court may amend all such imperfections, &c. as are not so set down. But this statute does not extend to or cure wants of substance; which may, therefore, still be taken advantage of, on a general demurrer.

*Lawes' Plead.* 169,  
170.  
*Hob.* 232, 233.

As a general demurrer, at common law, confessed all matters formally pleaded, so now by the statute, it is a confession of all matters which are substantially well pleaded, though not formally, that is, not according to the forms meant or alluded to by this law; for such forms are now immaterial, when the want or imperfection of them is not specially expressed in the demurrer.

But a special demurrer, even since the statute, is expressly intended to take advantage of such informalities in the pleadings, as are particularly pointed out by it; and, therefore, it is only a confession of such matters informally pleaded, as are not specially shewn for cause of demurrer. Lawes' Plead. 170.

As a plea ought to answer all that part of the declaration to which it is applied, and a replication to the whole of the plea, &c. so a demurrer ought to be to the whole of the count, plea or replication, &c. otherwise it is a discontinuance, if there be no other answer to the residue, and the adversary do not take notice of the omission, (as he ought to do, by praying judgment as to the part unanswered.) Ibid. 171.

But the defendant may demur to the whole or part only of a declaration; or the plaintiff to some or one only of several pleas, and plead or reply, &c. to the residue. Ibid. 172.  
Com. Dig. tit. Plead-  
der, E. 1.

There can be no demurrer to a demurrer; for a demurrer upon a demurrer, or pleading over when an issue in fact is offered, is a discontinuance. Salk. 219.  
Lawes' Plead. 172.

### XIX. Of surplusage.

Surplusage, in pleading, signifies a superfluous and useless statement, which frequently does not vitiate the rest of the pleadings, according to the well known maxim, "*utile per inutile non vitiatur*." Ibid. 63.

Therefore, if a man in his declaration or plea, &c. make mention of a thing which need not be stated, but the matter set forth is grammatically right, and perfectly sensible, and it does not disclose that the party pleading has no cause of action or defence, nor is it contradictory to what is before alleged, no advantage, it seems, can be taken of it by demurrer. Com. Dig. tit. Plead-  
der, C. 23, 29. E. 12.  
1 Salk. 325.  
Lawes' Plead. 63, 64.

But as the parties, plaintiff and defendant, are bound to state their cases formally, if the surplusage be not grammatically right, or if it be absurd in the sense, or un- Ibid. 64.

intelligible, and no sense at all can be given to it ; or if it shew that the plaintiff has no cause of action, or the defendant no defence, or be contradictory or repugnant to what is before alleged, the adversary may take advantage of it on a special demurrer.

#### XX. Of affirmative and negative pregnant.

*Ibid.* 113.

Issue cannot be joined on a negative or affirmative pregnant, that is, such a negative as supposes or implies an affirmative, or such an affirmative as implies a negative, as "that the party did not make the gift or grant, stated in the declaration or count by the deed therein mentioned," for that impliedly admits a gift by parol, and, therefore, the issue cannot be joined in those words, but it ought to be "that the party did not make the gift in manner and form set forth."

*Ibid.* 114.  
Bac. Abr. tit.  
Pleas, etc. J. 6.

Such an affirmative or negative pregnant is held to be bad upon a demurrer, (4) because it does not contain a certain, single and direct affirmative or negative of the point in question.

#### XXI. Of immaterial issues.

Lawes' Plead. 137.

Every plea ought to contain issuable matter, that is, matter upon which the adverse party may, if he please, take issue, and go to trial ; and if it do not it will be bad.

*Ibid.*  
2 Wils. 74.

Thus, if the defendant plead merely that he is, and always has been ready to pay the debt, without saying that he ever tendered it, his plea will be bad ; for his readiness to pay it is not issuable : or, in other words, the plaintiff cannot safely take issue upon that fact, nor ought it to determine the cause.

#### XXII. Of repleader.

Lawes' Plead. 175.  
Bac. Abr. tit.  
Pleas, etc. M. 1.

When issue is joined on an immaterial point, or such a point upon which, after trial, the court cannot give

(4) The demurrer must be special. See Bac. Abr. tit. Pleas, &c. J. 6. in nota.

judgment on account of its being impertinent or uncertain, and not determining the right ; the court will award a repleader, that is, give judgment for the parties to plead the cause over again ; in which case they must begin to replead at the first fault. If the declaration, plea and replication be all bad, the parties must begin *de novo* ; and if the plea and replication be both bad, and a repleader is awarded, it must be as to both ; but if the declaration and plea be good, and the replication only bad, the parties replead from the replication only.

### XXIII. Of pleas *fuis darrein continuance*.

It may sometimes happen, that after the defendant has pleaded, nay, even after issue or demurrer joined, there may have arisen some new matter, which it is proper for the defendant to plead ; as, that the plaintiff being a *feme sole*, is since married, or that she has given the defendant a release, and the like. Here, if the defendant takes advantage of this new matter, as early as he possibly can, he is permitted to plead it in what is called a plea *fuis darrein continuance*, or since the last adjournment. For it would be unjust to exclude him from the benefit of this new defence, which it was not in his power to make, when he pleaded the former. 3 Bl. Com. 316, 317.

But it is dangerous to rely on such a plea, without due consideration ; for it confesses the matter which was before in dispute between the parties. And it is not allowed to be put in, if any continuance has intervened between the arising of this fresh matter and the pleading of it : for then the defendant is guilty of neglect, or *laches*, and is supposed to rely on the merits of his former plea. Also, it is not allowed after a demurrer is determined, or verdict given ; because then relief may be had in another way, namely, by writ of *audita querela*. Ibid. 317.

## XXIV. Of arrests of judgment.

3 Bl. Com. 392.

Arrests of judgment arise from intrinsic causes, appearing upon the face of the record. Of this kind are first, where the verdict materially differs from the pleadings and issue thereon; as if, in an action for words, it is laid in the declaration that the defendant said, "the plaintiff *is* a bankrupt;" and the verdict finds specially that he said "the plaintiff *will be* a bankrupt." Or, secondly, if the case laid in the declaration is not sufficient, in point of law, to found an action upon.

Ibid. 394.

And this is an invariable rule with regard to arrests of judgments upon matters of law, "that whatever is alleged in arrest of judgment, must be such matter, as would, upon demurrer, have been sufficient to overturn the action or plea."

Ibid.

As if, on an action for slander, in calling the plaintiff a jew, the defendant denies the words, and issue is joined thereon; now if a verdict be found for the plaintiff, that the words were actually spoken, whereby the fact is established, still the defendant may move in arrest of judgment, that, to call a man a jew, is not actionable: and if the court be of that opinion, the judgment shall be arrested, and never entered for the plaintiff.

Ibid.

But the rule will not hold *e converso*, "that every thing that may be alleged as cause of demurrer will be good in arrest of judgment;" for if a declaration or plea, omits to state some particular circumstance, without proving of which, at the trial, it is impossible to support the action or defence, this omission shall be aided by a verdict.

Ibid.

As if, in an action of trespass, the declaration doth not allege that the trespass was committed on any certain day, though this defect might be good cause to demur to the declaration or plea, yet if the adverse party omits to take advantage of such omission, in due time, but takes issue, and has a verdict against him, this excep-

tion cannot, after verdict, be moved in arrest of judgment.

For the verdict ascertains those facts, which before, <sup>Ibid.</sup> from the inaccuracy of the pleadings, might be dubious; since the law will not suppose that a jury, under the inspection of a judge, would find a verdict for the plaintiff or defendant, unless he had proved those circumstances, without which, his general allegation is defective.

Exceptions, therefore, that are moved in arrest of judgment, <sup>Ibid.</sup> must be much more material and glaring than such as will maintain a demurrer: or, in other words, many inaccuracies and omissions, which would be fatal, if early observed, are cured by a subsequent verdict; and not suffered in the last stage of a cause, to unravel the whole proceedings.

But if the thing omitted be essential to the action or defence, as if the plaintiff does not merely state his title <sup>Ibid.</sup> in a defective manner, but sets forth a title that is totally defective in itself; this cannot be cured by a verdict.

#### XXV. Of pleading in criminal cases.

These pleas are either, 1. To the jurisdiction: 2. A demurrer: 3. In abatement: 4. In bar: or, 5. The general issue.

1. A plea to the *jurisdiction*, is where an indictment is taken before a court, that hath no cognizance of the offence: as if a man be indicted for treason at the court of common pleas; in such case he may except to the jurisdiction of the court, without answering at all to the crime alleged. <sup>4 Bl. Com. 333.</sup>

2. A *demurrer* to the indictment. This is incident to criminal cases, as well as civil; when the fact as alleged <sup>Ibid. 333, 334.</sup> is allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists, that the fact, as stated, is no felony, treason, or whatever the fact is alleged to be. In capital cases, if a demurrer be determined against the prisoner, judgment shall not

be entered against him, but he shall nevertheless be allowed to plead the general issue, "not guilty," and to have a trial, notwithstanding the demurrer.

*Ibid.* 334, 335.

3. A plea in *abatement* is principally for a *misnomer*, a wrong name, or a false *addition* to the prisoner. As if *James Allen, yeoman*, is indicted by the name of *John Allen, merchant*, he may plead that he has the name of James, and not of John; and that he is a yeoman, and not a merchant. And if either fact is found by a jury, then the indictment shall be abated, as writs or declarations may be in civil actions.

*Ibid.* 335.

But, in the end, there is little advantage accruing to the prisoner by these dilatory pleas; because, if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his plea avers to be his true name and addition. For it is a rule, upon all pleas in abatement, that he who takes advantage of a flaw, must, at the same time, shew how it may be amended.

*Ibid.*

4. Special pleas in *bar*. These are of three kinds, a former acquittal, a former conviction, or a pardon.

*Ibid.* 338.

5. The general issue, or plea of *not guilty*. In case of an indictment of felony or treason, there can be no special justification put in, by way of plea.

*Ibid.*

As on an indictment for murder, a man cannot *plead* that it was in his own defence against a robber on the highway, or a burglar; but he must plead the general issue, *not guilty*, and give this special matter in evidence.

## TITLE CXVII.

## POLYGAMY, LEWDNESS, AND INCEST.

**P**OLYGAMY is the offence of having a plurality of wives, at the same time.

4 Bl. Com. 163.

By statute it is enacted, that if any person within this commonwealth, being married, or who shall marry, shall marry any person, the former husband or wife being alive, or who shall continue to live so married, and being thereof convicted, shall be sentenced to be set on the gallows for the space of one hour, with a rope about his or her neck, and the other end thereof cast over the gallows, be publicly whipped not exceeding thirty stripes, be imprisoned, fined and bound to the good behaviour; all or any of these punishments, according to the aggravation of the offence; and the party or parties so offending, may receive such and the like proceeding, trial and execution, in such county where such person or persons shall be apprehended, as if the offence had been committed in the same county.

Stat. 1784, c. 40, s. 2.

Punishment.

In what county the offender may be tried.

There is a proviso that nothing contained in the act shall extend to any person whose husband or wife shall be continually remaining beyond sea by the space of seven years together, or whose husband or wife shall absent himself or herself the one from the other, by the space of seven years together; the one of them, in either case, not knowing the other to be living within the time.

Proviso.  
Where the husband or wife of the offender shall be absent for a certain period.

There is also another proviso that nothing contained in the act, shall extend to the wife of any married man who shall willingly absent himself from his said wife, by the space of seven years together, without making suitable

Proviso.  
Where the wife shall be deserted by the husband.

provision for her support and maintenance, in the mean time, if it shall be in his power so to do.

Where the first marriage was within the age of consent.

So the act shall not extend to any person by reason of any former marriage, within the age of consent.

#### LEWDNESS.

Stat. 1784, c. 40, s. 6.

By statute it is enacted, that if any man and woman, either or both of whom being then married, shall lewdly and lasciviously associate and cohabit together, or if any man and woman, married or unmarried, shall be guilty of open gross lewdness and lascivious behaviour, and being convicted thereof before the supreme judicial court, shall be punished by sitting in the pillory, whipping, fining, imprisonment and binding to the good behaviour; all or any of these punishments, according to the aggravation of the offence, (1.)

#### INCEST.

Stat. 1785, c. 69, s. 1.

By statute, if any man or woman shall intermarry, within the degrees of affinity or consanguinity prohibited by the act, every such marriage shall be deemed incestuous, and shall be null and void; and the issue of all such incestuous marriages shall be adjudged illegitimate, and be subject to all the legal disabilities of such issue.

Ibid. s. 6.

So if any person, who shall be divorced for the cause either of affinity or consanguinity shall, after such divorce, cohabit together, such persons so offending shall be liable to all the pains and penalties, provided by the laws then in being, against incest.

(1) See Commonwealth v. Catlin, 1 Mass. Rep. 8.

TITLE CXVIII.

PROBATE COURTS.

**B**y statute it is enacted that a probate court shall be held within the several counties of this commonwealth, and there shall be, in the manner the constitution directs, (1) some able and learned person in each county within this commonwealth, appointed or to be appointed judge for taking the probate of wills, and granting administrations on the estates of persons deceased, being inhabitants of, or resident in the same county at the time of their decease ; for appointing guardians to minors, idiots and distracted persons ; for examining and allowing the accounts of executors, administrators or guardians ; and for such other matters and things as the courts of probate, within the several counties, shall, by the laws of the commonwealth, have cognizance and jurisdiction of ; who shall have full power and authority to make out such process or processes, as may be needful for the discharge of the trust reposed in him ; and all sheriffs, deputy sheriffs, and constables, are required duly to serve and execute all legal warrants or summons to them directed by any judge, of probate.

Stat. 1783, c. 46, s. 1.

Establishment of probate courts.

Their general jurisdiction.

Its process.

And contempt of authority in any case or hearing before the judge of probate, shall and may be punished in like manner, as such contempt of authority in any court of common pleas, may, or can by law be punished.

Ibid.

Punishment for contempt.

The same statute has further enacted, that there shall be, in manner as the constitution directs, (2) a suitable

Ibid. s. 2.

Registers of probate.

(1) The judge of probate is appointed by the governor and council. Const. c. 2, s. 1, a. 9.

(2) Registers of probate are appointed by the governor and counsel. Const. c. 2, s. 1, a. 9.

ble person in each county within this commonwealth, appointed, or to be appointed register of wills, administrations, accounts, decrees, orders, determinations, and other writings which shall be made, granted or decreed upon, by the judges of probate of wills, in their respective counties; which register shall be sworn to the faithful performance of the duties of his office, and have the care, custody, and keeping of all files, papers and books, to the probate office belonging; and in case of death, sickness, or necessary absence of the register, it shall and may be lawful for the judge of probate to nominate and appoint some meet person to officiate as a register, to be sworn as aforesaid, until the standing register shall be able to attend his duty, or till a new one shall be appointed by the governor and council.

*Ibid.* s. 3.

The supreme judicial court, the supreme court of probate.

The same statute has further enacted, that the supreme judicial court shall be the supreme court of probate within the commonwealth, who shall have the appellate jurisdiction of all matters determinable by the judges of probate, in their respective counties; and all appeals from any order or decree of a judge of probate, which shall be made after the passing of this act, shall be to the said court accordingly; and the said supreme court of probate shall have cognizance, in the first instance, of all matters wherein the judge of probate of any county is a party, or interested.

TITLE CXIX.

PROFANENESS.

1. **P**ENALTY for profane cursing and swearing ; and how, and within what time the offender must be prosecuted.

2. Right of appeal from the justice before whom a conviction is had.

3. The officers whose duty it is to inform of this offence.

4. Duty of town-clerks to read, at stated periods, the act against this offence ; and the penalty for their neglect of such duty.

I. Penalty for profane cursing and swearing ; and how, and within what time the offender must be prosecuted.

By statute it is enacted, that if any person, who has arrived at discretion, shall profanely curse or swear, and shall be thereof convicted, such person, so offending, shall forfeit and pay a sum, not exceeding *two dollars*, nor less than *one dollar*, according to the aggravation of the offence, and the quality and circumstances of the offender, in the judgment of the court or justice of the peace, before whom the conviction may be.

Stat. 1798, c. 33, s. 1.  
Penalty on the first conviction.

And in case the offender shall, after one conviction as aforesaid, offend a second time, such offender shall forfeit and pay, upon such second conviction, double the sum forfeited on the first conviction.

Ibid.  
Penalty on the second conviction.

And in case the same person shall, after two convictions as aforesaid, again offend, such offender shall forfeit and pay, upon each and every subsequent conviction, treble the sum forfeited on the first conviction.

Ibid.  
Penalty on the third conviction.

*Ibid.*

Penalty for every  
profane oath or curse  
after the first.

And if, on any trial and conviction, proof shall be made that more than one profane oath or curse were sworn or uttered, by the same person, at the same time, and in the presence or hearing of the same witness or witnesses, the person, so offending, for every profane oath or curse after the first, shall forfeit and pay a sum not exceeding *fifty cents*, nor less than *twenty-five cents*, in addition to the sum forfeited as first above specified.

*Ibid.*

Appropriation of the  
penalties.

One moiety of the several forfeitures aforesaid, to be to the use of the poor of the town, in which the offence shall have been committed, and the other moiety thereof to the use of the person or persons who shall make complaint thereof, or prosecute for the same.

*Ibid.*

How the offender is  
to be disposed of, in  
case he omits to pay  
his fine.

And in case any person convicted of profane cursing or swearing, shall not immediately pay the sum or sums so forfeited, such person shall be committed to the common gaol or house of correction, there to remain, not less than one day nor more than five days.

*Ibid.* s. 2.

The offender must, if at all, be prosecuted within twenty days after the offence committed.

II. Right of appeal from the justice before whom a conviction is had.

*Ibid.* s. 1.

Respondent must  
plead to the com-  
plaint.

When any person shall have been convicted of profane cursing or swearing, before any justice of the peace, and having appeared before said justice, and pleaded the general issue, or demurred to the charges in the complaint against him, it shall be lawful for such defendant to appeal from the sentence of the justice, to the next court of general sessions of the peace, to be holden in and for the county wherein the offence was committed, who shall hear, and finally determine the same; the appellant claiming such appeal at the time of declaring such sentence by said justice, and then and there recognizing with sufficient surety or sureties in a reasonable sum, not exceeding *twenty dollars*, to prosecute his said appeal

Time of claiming ap-  
peal.

Respondent must re-  
cognize.

with effect, and to perform the order of said court therein.

III. The officers whose duty it is to inform of this offence.

If any person shall profanely curse or swear in the hearing of any sheriff, deputy sheriff, coroner, constable, grand juror or tythingman, it shall be the duty of such officers, respectively, forthwith to give information thereof to some justice of the peace of the county wherein the offence may be committed, in order that the offender may be taken, convicted and punished for the same. Ibid. s. 2.

The form of the record of conviction is prescribed by the act, and may be seen in the appendix. See Appendix, No. 1.

IV. Duty of town-clerks to read, at stated periods, the act against this offence ; and the penalty for their neglect of such duty.

The clerks of the several towns, districts and plantations in this commonwealth, shall cause such act to be publicly read, at the opening of their respective annual meetings, in the month of March or April ; and if the clerk of any town, district or plantation, shall neglect so to do, he shall forfeit and pay the sum of *ten dollars* for each neglect, to be recovered by an action of debt, in any court proper to try the same ; one moiety thereof to the use of the person or persons suing therefor, and the other moiety thereof to the use of the commonwealth. Stat. 1798, c. 33, s. 3.

**TITLE CXX.**

**PROPRIETORS.**

1. **O**f the manner of calling a proprietors' meeting, as directed by the act of 1783, c. 39.
2. What proceedings are lawful at such meeting.
3. Of the power and duty of the moderator of such meeting.
4. Of the power of such proprietors to raise money.
5. Proceedings in case any proprietor neglects to pay his proportion of the money voted.
6. How far each proprietor may manage his proportion of land.
7. Of the corporate rights of proprietors; and of the service of writs issued against them.
8. Of the treasurer, assessors and collectors of such proprietors.
9. Of the duty of proprietors' last clerk; and of the disposal of proprietors' records after a final division of their lands.
10. Of the manner of calling a meeting of proprietors of common and general fields as directed by the act of 1785, c. 53.
11. What proceedings are lawful at such meetings; and herein of the power of such proprietors to raise money.
12. Proceedings when any such proprietor considers himself aggrieved by any assessment.
13. Duty of such proprietors to run lines at stated periods; and their power of discontinuing their fields.

I. Of the manner of calling a proprietors' meeting, as directed by the act of 1783, c. 39.

By this statute it is enacted, that when and so often as any five, or the major part, of the proprietors of lands, wharves or other real estate, lying in common in any part of this commonwealth, shall judge a proprietors' meeting to be necessary, they may make a written application to a justice of the peace through the commonwealth, or to a justice of the peace within the county, where such estate lies, for a warrant for the calling of a meeting, expressing the time, place and occasion thereof.

Stat. 1783, c. 39, s. 1.

Application to a justice of the peace.

And such justice is empowered to grant a warrant for such meeting accordingly, directed to one of the proprietors asking the same, or to the proprietors' clerk, requiring him to notify the proprietors of the meeting, and the time, place and occasion of the same; which notification, in case such undivided estate lies in any incorporated town, shall be given in writing, and posted up in some public place or places within such town, fourteen days, at least, before the day appointed for the meeting, and for the like time (at least) before such meeting, shall be advertised in one of the *Boston* weekly newspapers, and in one of the newspapers (if such there be) printed in the county wherein such real estate lies; or in case such undivided estate doth not, or shall not lie within any incorporated town, such written notification shall be given by advertising the same in any two of the said *Boston* newspapers, and in one other newspaper (if such there be) printed out of *Boston*, in the county where such estate lies, at least four weeks successively before such meeting; or such meetings may be otherwise warned, by posting up written notifications, in some public place, in each and every town and plantation where any one or more of the said proprietors may reside, fourteen days at least, before the time appointed for holding such meeting.

Ibid.

The justices's warrant for such meeting.

Notification of such meeting.

## II. What proceedings are lawful at such meeting.

Ibid.	The same statute has further provided, that such and so many of the proprietors as shall assemble personally, or by their attorneys, and meet accordingly, shall have
Choice of officers.	power, by a major vote, to choose a moderator, a clerk, a treasurer, a collector or collectors of taxes, a committee or committees, and any other needful officers to manage
Duty of proprietors' clerk.	their affairs ; which clerk shall enter and record all votes and orders that, from time to time, shall be made and passed in the proprietors' meetings, who shall be sworn
Proprietors may agree upon a mode of calling future meetings.	to the faithful discharge of his office ; and to agree upon and appoint any other way of calling and summoning
And may pass votes for the benefit of their lands.	meetings for the future, that shall be most convenient and suitable to the proprietors ; as also to pass votes or orders for the settling, or encouraging the settling, managing, improving or dividing such common lands, wharves or other real estate, not before severed and divided ; and to annex penalties to the breach and non-observance of such orders. <i>Provided</i> , such penalty doth not exceed <i>fifteen shillings</i> for one offence. <i>Provided also</i> ,
And may annex penalties for the breach of such orders as they may pass.	that such orders, so made, with penalties annexed to them, be allowed and approved by the court of general sessions of the peace, for the county where such land or estate lies, and be not repugnant to the general laws of this commonwealth ; in which case, such orders shall have such force and effect as that such proprietors, by their treasurer, agent or agents, may recover the penalty thereto annexed, against the breakers or non-observers thereof, in any court proper to try the same ; such penalty to be disposed of as the proprietors shall direct.
Such orders to be approved by the sessions, and not to be repugnant to the laws of the commonwealth.	
Mode of recovering such penalties.	
Ibid.	And the votes shall always be collected and numbered according to the interest of the proprietors present, where the same is known. And no other affair shall be acted on, at any meeting of the proprietors, than what is expressed in the warrant or notification for such meeting.
How votes are to be collected and numbered. Nothing to be acted upon but what is expressed in the warrant for the meeting.	

### III. Of the power and duty of the moderator of such meeting.

The same statute has further enacted, that the moderator, chosen at any such meeting, shall be empowered to manage and regulate the business of the meeting. And where it shall so happen, that any matter remains doubtful after a vote, the moderator is directed and required to cause the same to be decided by a poll, if any one or more desire it; such polls to be numbered according to their interest.

*Ibid.* s. 2.

The same statute has further enacted, that no person shall have right to speak before leave first obtained from the moderator, nor when any other is orderly speaking; and that all persons be silent at the order of the moderator, under the penalty and forfeiture of *five shillings*, for the breach of every such order; and if any person, being by the moderator notified of such offence, shall still persist in the same, then the moderator may order such person to withdraw from the said meeting; and such offender, upon his refusal so to do, shall forfeit and pay the sum of *twenty shillings*: the respective forfeitures to be recovered by the clerk of such proprietors, before any one of the justices of the peace for the county, wherein such land or other estate lies, or such clerk lives, to be disposed of, the one half to the use of the propriety, the other half to the said clerk.

*Ibid.* s. 3.

Forfeiture for disobedience of the lawful authority of the moderator.

How such forfeiture shall be recovered.

Disposition of such forfeiture when recovered.

### IV. Of the power of such proprietors to raise money.

By statute it is enacted, that it shall be lawful for the proprietors of any undivided lands or other real estate, or the major part of them, according to the interest of the proprietors present, by themselves or their lawful attorneys, at any legal meeting, to vote, grant, or order the raising of any suitable sum or sums of money, that by them shall be thought sufficient for bringing forward, completing the settlement of, or managing or improv-

*Ibid.* s. 5.

ing such lands and estate ; and to carry on, and prosecute or defend, any actions or suits that may be brought by or against them, or for carrying on, managing or effecting any other affair for the common good of such proprietors ; and to levy and apportion such sum or sums (raised for the ends and uses aforesaid,) upon the proprietor's several rights in the common and undivided lands or estates, equally and rateably, according to their several interests therein.

V. Proceedings in case any proprietor neglect to pay his proportion of the money voted.

*Ibid.*

On such neglect of such proprietor, his share may be sold.

Notice of such sale must be given.

The same statute has further provided, that every proprietor who shall neglect to pay to the collector, or treasurer, or committee of such propriety, his proportion of such sum or sums of money, as have been, or from time to time shall be, duly granted and voted to be raised and levied upon the proprietors' rights and shares in such lands and estate, for the space of six months with respect to those who live within this commonwealth, and twelve months with respect to those who live out of it, after such grant ; and his or their proportion thereof shall have been posted and published in the several newspapers as in the case of notifications ; then the committee of the proprietors, or the major part of such committee, are fully empowered, from time to time, at a public vendue, to sell and convey away, so much of the delinquent proprietor's right or share, in such common land or estate, as will be sufficient to pay and satisfy his tax or proportion of such grant, and all reasonable charges attending such sale, to any person that will give most for the same ; notice of such sale, and of the time and place thereof, being given by posting as aforesaid, and publishing the same in at least two of the newspapers aforesaid, five weeks successively before the time of such sale ; and may execute a good deed or deeds of conveyance of the

lands or estate so sold unto the purchaser thereof, to hold in fee simple.

*Provided nevertheless*, that the proprietor or proprietors, whose right or share shall be so sold, shall have the liberty to redeem the same, at any time within twelve months after such sale, by paying the sum such right or share sold for, and charges, together with the further sum of *twelve pounds* for each *hundred pounds* produced by such sale, and so *pro rata* for any less or greater sum.

*Ibid.*

Right of redemption of any share thus sold.

VI. How far each proprietor may manage his proportion of land.

The same statute has further enacted, that the proprietors of such undivided land or estate where the same hath been theretofore stated, and each one's proportion known, are empowered to order, manage, improve, divide, or dispose of the same in such manner as shall be concluded and agreed upon by the major part of the interested present at any legal meeting; the votes to be collected and accounted according to the interests.

*Ibid.* s. 8.

Where each one's proportion has been before stated and known.

And any proprietor may vote as well by attorney, specially appointed for that purpose, as in person.

*Ibid.*

Proprietors may vote by attorney.

And the proprietors of all such undivided land and estate not stated, nor the proportions known as aforesaid, are empowered to order, manage, improve, divide, or dispose of the same, as hath been, or shall be concluded and agreed on, by the major part in number of such proprietors present at any such meeting.

*Ibid.*

Where the proprietors are not known.

VII. Of the corporate rights of proprietors; and of the service of writs issued against them.

By statute 1783, c. 39, s. 4, it is enacted, that it shall be lawful for all proprietors in common and undivided lands, grants and other real estate or interests whatsoever, to prosecute any suits or actions in any court proper to try the same, either by themselves or their agents or attorneys, and in like manner, to defend all such suits

Their right to bring and defend actions.

To choose agents to prosecute or defend in their behalf.

and actions as shall be commenced against them, or any of them; and at a legal meeting to choose such agents or attorneys to prosecute for, or defend them; such choice being certified by the clerk of such proprietors, or by such other person as they shall respectively appoint.(1)

They may continue in their corporate capacity until debts and taxes are paid, notwithstanding a previous final division of the estate.

By an additional act 1790, c. 40, s. 1, it is provided, that notwithstanding the final division of any lands, wharves, or other real estate lying in common, and which had been, or shall have been held and improved as a proprietary, the last proprietors, or holders in common, shall continue in their corporate capacity, until all debts and taxes due to such proprietary, are collected and received, and until all their contracts and agreements, made prior to such final division, shall be performed; and are, and shall be liable and capable, in and by the same name and capacity, as before such division, to sue and be sued, and by their agents to pursue and defend in all matters and demands, respecting such proprietary, until final judgment and execution; and shall and may call and hold meetings, and choose all necessary officers, and may vote, assess, levy and collect all reasonable rates and assessments, in like manner, form and proportion as before such division, such proprietary could, or might have done.

And as such may sue and be sued.

And may call meetings, and choose officers.

And may vote and collect assessments.

How long their corporate capacity shall continue after a final division of their lands.

Limitation of actions against them.

Service of writs against them.

It is enacted by the third section of the same statute, that the proprietors aforesaid, shall not continue to act in their corporate capacity for more than ten years after the final division of their lands, or other real estate, nor shall any suit brought against them be sustained, unless commenced within six years from the passing the act, or from the time such right of action shall accrue.

By the statute 1783, c. 39, s. 6, it is provided that when it shall happen that a suit shall be brought against any proprietors of any common or undivided lands or

(1) *Such corporations may prove corporate possession otherwise than by corporate acts.*

Prop. of Mohuma v. Rogers, 1 Mass. Rep. 139.

other estate, the plaintiff bringing forward such suit, shall cause the clerk of such proprietors to be served with a copy of the writ or summons, at least thirty days before the sitting of the court to which the same shall be returnable.

VIII. Of the treasurer, assessors, and collectors of such proprietors.

By statute it is enacted, that the treasurer, assessors, collector or collectors, which at any time may be chosen by the proprietors of any common and undivided lands or other real estate, shall be sworn before a justice of the peace, to the faithful discharge of their respective trusts ; and in case no justice of the peace shall be present at the meeting of such proprietors, then any, or all the officers directed to be sworn by the act, may be sworn by the moderator.

How sworn.

And the treasurer is empowered to demand, sue for, recover and receive all such sums of money, debts and dues, as shall at any time belong to the said proprietors, or be any ways due or coming to them, and make payment thereof according as he shall be lawfully ordered and directed by the proprietors, and render his reasonable account thereof on demand ; and such treasurer shall continue in his office till the proprietors shall see cause to choose another.

Ibid.

Power of the treasurer, and how long he shall continue in office.

IX. Of the duty of proprietors' last clerk ; and of the disposal of proprietors' records after a final division of their lands.

By statute 1783, c. 39, s. 9, it is enacted, that the last clerk chosen by the proprietors of any common and undivided land, or other real estate in this commonwealth, who are or have been, or may thereafter be empowered by law to hold meetings, choose a clerk and other officers, shall continue to execute the office of clerk to which he was appointed, notwithstanding the final and

The clerk shall continue to execute his office notwithstanding the final division of the lands.

Proprietors' records to be lodged with the clerk of the town, or such town as the sessions shall order.

The clerk with whom such records are lodged, are authorized to make out and authenticate copies therefrom.

Such records may be recalled by the proprietors.

total division of such lands and estate, as fully, to all intents, constructions, and purposes whatsoever, as though there had been no such division made, and until the same records shall be lodged with the clerk of the town in which the land lies; and when the lands lie in several towns, they may be lodged with the clerk of such town, as the court of sessions, upon application made to them for that purpose, shall order and direct; and the clerk with whom they may be lodged, and his successors in office, shall be fully authorized to authenticate any copies therefrom, as from the records of the town in which he is clerk.

By the additional act 1790, c. 40, s. 2, it is enacted, that where, after such final division of any lands or other real estate, which have been, or shall have been held as a proprietary, the proprietors making such division have ordered and delivered, or shall order and deliver the record of their proprietary into the custody of the town-clerk, in which such land or other real estate, or part thereof, may lay; the proprietors who shall hold any meeting, may recal the said record, and cause the clerk then appointed and sworn, or the town-clerk, to whom such records have been committed, to record all votes and proceedings, which shall be had at any meeting, and copies of the same may be certified as by law is provided for certifying any other part of such record.

X. Of the manner of calling a meeting of proprietors of common and general fields as directed by the act of 1785, c. 53.

Stat. 1785, c. 53, s. 1.

By this statute it is enacted, that in any and every town or plantation in this commonwealth, where several allotments of land are inclosed and fenced in one general field, or where they have been so inclosed, fenced and improved; or where all the proprietors of any land shall see cause to inclose, fence, and improve the same in such manner; such proprietors may, sometime in

*March*, annually, and from time to time as they judge proper, meet together to make such rules, and adopt such modes of improvement, as they shall think just and equitable, and most for the general benefit.

And for the better enabling such proprietors to call a meeting for the ends aforesaid, it shall be in the power of any justice of the peace for the county where such lands lie, upon application made to him by any two of the proprietors of such general fields, to issue out a warrant for such meeting; which warrant, and also the notification of the meeting, shall express the business thereof, and shall be conducted in the same manner as those for calling a meeting of proprietors of common lands prescribed by statute 1783, c. 39.

XI. What proceedings are lawful at such meetings; and herein of the power of such proprietors to raise money.

By the same statute it is enacted, that the proprietors of such general fields respectively, shall be fully authorized and empowered, in a proprietors' meeting for that purpose regularly convened, by a major vote of the proprietors then present, (the votes to be collected according to the interest of the proprietors) to agree upon and pass one or more votes for raising and collecting such sum or sums of money, from time to time, as they shall judge necessary for defraying the charges aforesaid, and for carrying on, or managing any common affairs, relating to such proprietors; and that they be alike empowered to choose three or five assessors for the assessing and apportioning such sum or sums so agreed on and voted, upon the proprietors of such fields, according to their several interests therein; and to appoint a collector or collectors to gather in and collect the same; which collector or collectors shall be fully empowered to levy and collect the sum or sums, so set and apportioned for such proprietors to pay, in the same manner as constables of towns, within this commonwealth, are empowered to levy

*Ibid.* a. 3.

How the votes are to be collected.

What officers may be chosen.

Power of collectors.

Power, duty and liability of the clerk.

and collect the public rates or taxes ; and to pay in the same to the proprietors, or their clerk, who is empowered to grant warrants, for the levying and collecting such assessment, at such time as shall be by them appointed for the payment thereof ; and such clerk shall be accountable to the proprietors therefor ; the person or persons so assessing the said proprietors, and the collector or collectors who shall be so appointed for the gathering and collecting such sum or sums, so granted and agreed upon by the said proprietors to be assessed and collected as aforesaid, shall be under oath, for the true and faithful performance of their services respectively ; which oath shall be administered to them as the law provides for swearing town officers.

Assessors and collectors to be under oath.

How such oath is to be administered.

*Ibid.* s. 10.

How the votes are to be collected and counted.

By the same statute it is enacted, that at every meeting of such proprietors, the votes shall, by the moderator, be collected and counted, according to the interest of the proprietors present, where such interests are known.

XII. Proceedings when any such proprietor considers himself aggrieved by any assessment.

*Ibid.* s. 3.

Under proviso.

Any such proprietor who apprehends himself aggrieved, or over-rated in the making or apportioning such assessment, shall have liberty to apply to the justices of the general sessions of the peace, in the respective counties where such fields lie, for relief ; and, in such case, the said justices are empowered to grant relief accordingly ; and their judgment to be final.

XIII. Duty of such proprietors to run lines at stated periods ; and their power of discontinuing their fields.

*Ibid.* s. 7.

Each proprietor of lands lying unfenced, or in any common field, shall, once in two years, on six or more days warning, previously given him by the proprietor or proprietors of the land next adjoining, run the lines and make or keep up the boundaries betwixt their respective

lands, by sufficient meer-stones, on pain that every party so neglecting or refusing shall forfeit the sum of *ten shillings* to the party moving or requesting to run the line; the conviction of such neglect or refusal being had before any justice of the peace within the same county, who is empowered to hear and determine the case.

It shall be lawful for the proprietors who own the major part of the interest or property in any common or general field, at a legal meeting to be warned for that purpose, to dissolve and discontinue such field; six months being allowed to elapse before such discontinuation. <sup>Ibid. s. 8.</sup>

TITLE CXXI.

PUBLIC WORSHIP.

1. **O**f the right and duty of public worship.
2. Duty of towns to be provided with ministers; and the penalty for neglect of such duty.
3. Of contracts between ministers and their people.
4. Of taxes for the support of public worship.
5. Penalty for non-attendance on public worship.
6. Penalty for indecent behaviour in meeting; or for disturbing a religious assembly.

I. Of the right and duty of public worship.

Declaration of Rights,  
art. 2.

Right and duty of  
public worship.

The constitution declares, that it is the right, as well as the duty, of all men in society, publicly, and at stated seasons, to worship the supreme being. And no subject shall be hurt, molested or restrained in his person, liberty or estate, for worshipping God, in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

Ibid. art. 3.

The legislature invested with power to enforce the duty of public worship.

The constitution has further declared, that, as the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of God, and of public instructions in piety, religion and morality: Therefore, to promote their happiness, and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power

to authorize and require, and the legislature shall, from time to time, authorize and require the several towns, parishes and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of God, and for the support and maintenance of public protestant teachers of piety, religion and morality, in all cases where such provision shall not be made voluntarily.

And the people of this commonwealth have also a right to, and do invest their legislature with authority to enjoin upon all the subjects, an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.

*Ibid.*

Attendance on public worship may be enforced by law.

And every denomination of christians demeaning themselves peaceably, and as good subjects of the commonwealth, shall be equally under the protection of the law : and no subordination of any one sect or denomination to another shall ever be established by law. (1)

*Ibid.*

All denominations of christians may be protected by law.

It is also provided by statute, that the respective churches, connected and associated in public worship,

Stat. 1790, c. 87, s. 1.

(1) "The great object of the third article of the declaration of rights, was to enjoin on the legislature, the causing public protestant teachers to be elected and maintained by the several incorporated religious societies in the state ; and to guard against an ecclesiastical hierarchy, and a religious test, by prohibiting a subordination of one denomination of christians to another. But it was not the intent, neither is it the language of that article, to prevent the legislature from making new religious incorporations, or from setting off the members of any religious incorporation to another religious incorporation, whether composed of the same or a different denomination of christians. And it is very common for the legislature, in creating a new religious incorporation, to give liberty to any of the members of it to recede from it, or to permit others in the neighbourhood to join it, they manifesting their election by some act of public notoriety, so that the right of assessing corporate taxes may be ascertained and well known."

Per Parsons, C. J. in delivering the opinion of the court, in *Thaxter v. Jones* and al. 4 Mass. Rep. 372.

VOL. III.

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Liberty of worship  
confirmed to churches,  
etc.

with the several towns, parishes, precincts and other bodies politic, being religious societies, established within the commonwealth, according to law; shall, at all times, have, use, exercise and enjoy all their accustomed privileges and liberties, respecting divine worship, church order and discipline, not repugnant to the constitution of this commonwealth, and shall be encouraged in the peaceable and regular enjoyment and practice thereof.

II. Duty of towns to be provided with ministers; and the penalty for neglect of such duty.

Stat. 1709, c. 87, s. 2.

Towns, etc. to be  
provided with ministers.

Penalty for the first  
neglect.

Penalty for any subsequent  
neglect.

How recovered.

To be levied on the  
inhabitants.

How such fines to be  
disposed of.

By statute, every corporate town, parish, precinct, district and other body politic, and religious society, is required to be constantly provided with a public protestant teacher of piety, religion and morality; and in default of being so provided and supplied, for the term of three months in any six months, such town, parish, precinct, district and other body politic or religious society, which shall, in the judgment of the sessions for the same county, be adjudged of sufficient ability to be so provided, shall pay a fine, for a first offence, of a sum not exceeding *sixty dollars*, nor less than *thirty*; and for each and every like offence after the first, a fine not exceeding *one hundred dollars*, nor less than *sixty dollars*; together with costs of prosecution. Such fine to be recovered by indictment in the sessions, in the county where such delinquency may happen, and levied on the inhabitants composing such town, parish, precinct, district and other body politic or religious society, so delinquent, in the same manner as other fines are levied on the inhabitants of towns. And every such fine shall be disposed of, by order of said court, to the support of the public worship of God in such religious society in the same county, as, in the opinion of said court, shall stand most in need thereof.

### III. Of contracts between ministers and their people.

The constitution declares, that the several towns, parishes, precincts and other bodies politic, or religious societies, shall, at all times, have the exclusive right of electing their public teachers, and of contracting with them for their support and maintenance.

Declaration of Rights,  
art. 3.

Public teachers to be  
elected.

It is also provided by statute, that any contract made by any town, parish, precinct, district and other body politic or religious society, with any public protestant teacher of piety, religion and morality, as may be by them respectively chosen for their teacher or religious instructor, shall have the same force, and be as binding on such corporation or religious society, as any other lawful contract. And all courts of competent jurisdiction shall have power to sustain suits brought to enforce their performance. (2)

Stat. 1799, c. 87, s. 8.

(2) The nature and extent of the contract between a minister and his people, is very fully and learnedly explained by Parsons, C. J. in *Avery v. Inhabitants of Tyringham*, 3 Mass. Rep. 176. "It is a general rule that an office is holden at the will of either party, unless a different tenure be expressed in the appointment, or is implied by the nature of the office, or results from ancient usage. A consideration of the nature and duties of the ministerial office is important in determining its tenure. It is the duty of a minister to adapt his religious and moral instructions to the various classes comprising his congregation. He ought, therefore, to have a knowledge of their situation, circumstances, habits and characters, which is not to be obtained but by a long and familiar acquaintance with them.

"Vice is to be reproved by him in public and in private; and the more prevalent and fashionable are any bad habits, the more necessary it is for the faithful minister to censure them, and to rebuke those who indulge them. But if it be a principle, that his office and support depend on the will of his people, the natural tendency of such a principle, by operating on his fears, will be to restrain him from a full and plain discharge of his official duties. And it may be added, that the same principle, by diminishing his weight and influence, will render his exhortations and rebukes unavailing

## IV. Of taxes for the support of public worship.

Declaration of Rights,  
art. 3.

The constitution declares, that all moneys paid by the subject to the support of the public worship, and of the

and ineffectual. And as it cannot be for the interest of the people to hold a power, probably dangerous, and certainly inconvenient to themselves, I cannot believe that a tenure at will, whence this power results, can accord with the nature and duties of the office.

“ And it may be also observed, that, if the tenure of his office be at will, a minister, after a life of exemplary diligence in the exercise of his official duties, may, when oppressed with the infirmities of age, be removed from office, and be dismissed to poverty and neglect. A consequence of this power in a parish, will be the deterring of young men of information and genius from entering into the clerical profession ; and devolving the public instruction in religion and morals on incompetent persons, without talents, education or any suitable qualifications. Thus an office, which, to be useful, ought to attract our respect and veneration, will be the object of general contempt and disgrace. And an effect of this kind, surely every good citizen would wish the laws to prevent, so far as the laws may have power.

“ But considerations of irresistible weight result from the ancient usages established by our pious ancestors, and wisely continued to this day.

“ In the settlement of a minister, the parish invite some candidate to preach on probation, that they may have an opportunity to judge of his qualifications, and that he may have some knowledge of the state, temper and principles of the people. If a settlement be agreed upon by both parties, it is the general practice of parishes not having parsonages, to grant a sum of money or other property to the minister, exclusive of his annual salary, which is emphatically called his *settlement*. This name was derived from the uses to which it was intended the money should be applied by the minister. With it, he usually purchased, in his town, some domicile, where he might have a permanent abode among his people, and be conveniently situated to attend to all the duties of his office.

“ But if the tenure of his office be at will, it is unquestionably at the will of either party. The minister, therefore, if the parish can remove him at their pleasure, may, at his own pleasure, immediately after he has availed himself of the grant, abandon his office, and carry away his settlement, to the great loss and damage of the parish. The usage of granting a settlement is satisfactory evidence,

public teachers aforesaid, shall, if he require it, be uniformly applied to the support of the public teacher or

that the tenure of his office is not at will, but that the ministerial relation must continue until it be dissolved for a good cause.

“As an encouragement to settle ministers in new towns, where the property of the inhabitants is not large, the practice of granting permanent settlements has been long confirmed by grants from the provincial legislature, and from the general court of the commonwealth.

“When new townships are sold, two rights are reserved by the government, one as a parsonage for the minister and his successors, and the other for the use of the first settled minister and his heirs. Unwise indeed, and negligent must have been the legislature, in making this charitable provision, if the first minister, soon after his settlement, might resign his office at his own will, and retain for himself and his heirs the fruits of the public beneficence.

“But in forming my opinion, I am not confined to inferences drawn from the practice of towns or parishes in the settlement of ministers, or from the intent of legislative grants. Before and since the revolution, this question has been considered by the courts of law, in many actions sued by ministers for the recovery of their salaries. And it has been the uniform opinion of all the judges, who have successively filled the bench of our highest judicial court, that when no tenure was affixed to the office of a minister by the terms of settlement, he did not hold the office at will, but for life, determinable for some good and sufficient cause, or by the consent of both parties; and many cases have been mentioned, where this opinion was declared. And no case has been produced or referred to by the counsel for the defendants, where a different opinion has been given.

“The counsel for the defendants have contended that, admitting the contract of settlement, before the revolution, was not at will, the constitution has altered the law; and that now the tenure of the minister must be at will. The part of the constitution relied on, is the provision in the *third* article of the declaration of rights, which secures to towns, &c: the exclusive right *at all times* of electing their public teachers, and of contracting with them for their support and maintenance. The argument is in this form: a town shall at all times elect its public teacher, but if after one be elected, the town cannot remove him at pleasure, then there will be a time when the town cannot elect a public teacher, the office being full.

teachers of his own religious sect or denomination, provided there be any on whose instructions he attends ;

“ This argument will certainly prove too much. If the town, in the election of a public teacher, contracts with him for a certain number of years, by this construction it must have a right to break its contract solemnly made. A conclusion so unreasonable and unjust, it is supposed, the counsel for the defendants are not willing to admit. The fair and natural construction of this provision is, that a town, &c. shall at all times, when it hath no public teacher, have the exclusive right of election, but no right to violate its own contracts solemnly and deliberately made.

“ This article of the constitution has, without doubt, made some alteration in the ecclesiastical establishments of the state. Under the colonial laws, the church members, in full communion, had the exclusive right of electing and selecting their minister, to whose support all the inhabitants of the town were obliged to contribute. And when the town neglected or refused suitably to maintain the minister, the county court was authorized to assess on the inhabitants a sum of money, adequate to his support. Under the colony charter, no man could be a freeman, unless he was a church member, until the year 1662 ; and a majority of the church constituted a majority of the legal voters of the town. After that time, inhabitants, not church members, if freeholders, and having certain other qualifications, might be admitted to the rights of freemen. In consequence of this alteration, a different method of settling a minister was adopted under the provincial charter. The church made the election, and sent their proceedings to the town for approbation. If the town approved the election, it also voted the salary and settlement. When the candidate accepted, he was solemnly introduced to the office by ordination, and become the settled minister, entitled to his salary and settlement under the votes of the town. If the town disapproved, and the church insisted on its election, it might call an ecclesiastical council ; and if the council approved the election, the town was obliged to maintain the person chosen, as the settled minister if the town, by the interference of the court of sessions, if necessary ; but if the council disapproved, the church must have proceeded to a new election.

“ By the constitution, the rights of the town are enlarged, if it choose to exercise them, and those of the church impaired. If the church, when their election has been disapproved by the town, shall unwisely refuse to make a new election, or the town, for any

otherwise, it may be paid towards the support of the teacher or teachers, of the parish or precinct, in which the said moneys are raised.

cause, shall abandon the ancient usages of the country, in settling a minister, it may, without or against the consent of the church, elect a public teacher, and contract to support him. And such teacher shall have a legal right to the benefit of the contract, although he cannot be considered as the settled minister of the gospel, agreeably to the usages and practice of the congregational churches in the state. An adherence to these usages so manifestly tends to the preservation of good order, peace, and harmony among the people, in the exercise of their religious privileges, it may be presumed that a departure from them will never be admitted by any town, but in cases of necessity.

"It has been objected that a minister holds his office at his own will, because his town have no legal remedy, if he abandon his office, and therefore, that he should also hold at the will of the town. The conclusion is certainly just, if the premises were correct. But a minister does not hold his office at his own will; and if he abandon it without cause, and without the consent of his town, the inhabitants may recover at law, such damages as they have sustained by his injurious conduct. In *Cumberland* before the revolution, Mr. *Wirwall*, a settled minister in the parish of New-Casco, in the town of *Falmouth*, left his parish without its consent, and was ordained over the episcopal church in that town. The parish brought an action against him to recover damages, for his leaving his office. There was no objection made by the court, or the defendant's counsel, to the action, as not lying in such a case, but the cause went off from a variance between the declaration and the contract of settlement.

"It is farther objected that the minister ought to hold his office at the will of either party, because there is no jurisdiction competent to declare when the office is forfeited, or when the contract may be dissolved; and that the custom of applying to an ecclesiastical council may be rendered nugatory by either party refusing to concur in the appointment.

"This objection deserves a particular consideration. It is the duty of a minister to teach by precept and example. If his example is vicious, he is worse than useless. Immoral conduct is then such misfeasance, as amounts to a forfeiture of his office. I do not mean to include mere infirmities incident to human nature,

Stat. 1799, c. 87.

We have also a statute in affirmance of the above constitutional provision. But this statute having already

and to which an habitually good man is sometimes liable. Negligence also, or a wilful and faulty neglect of public preaching, or of administering the ordinances, or of performing other usual parochial duties, is such a non-feazance, as will cause a forfeiture of the office. In either of these cases, or in both, the town may, at a legal meeting, declare the office forfeited, assigning in their votes the causes of the forfeiture, and of their dismission. If the minister do not resist, no further question will arise; if he still claim the office, and sue for his salary, the charges made by the town, as creating a forfeiture, are questions of fact properly to be submitted to the jury. If they find the allegations true, the minister will not be considered as holding his office, after the vote of dismission. If the allegations are false, justice requires that he shall recover his salary. These allegations are competent for the jury to inquire into, and, on such inquiry, ultimately to decide. And doubtless, they would be as willing to relieve a town from the burden of supporting a vicious and unworthy minister, as they would to aid an exemplary and faithful one, in recovering his stipulated salary.

“ There are also objections to a minister, founded in questions of doctrine and discipline. A town may sometimes desire a dissolution of the ministerial contract, from its impoverishment, by a great part of its inhabitants annexing themselves to other denominations of christians, or from other causes. A minister may also desire his dismission from various causes. In all these cases therefore, and also on charges of immorality and neglect in the minister, the parties, if they cannot agree to dissolve the contract, may call to their assistance an ecclesiastical council, mutually chosen; and their advice, technically called their result, is so far of the nature of an award made by arbitrators, that either party conforming thereto will be justified. If, in a proper case for the meeting of an ecclesiastical council to be mutually chosen, either party should, unreasonably, and without good cause, refuse their concurrence to a mutual choice, the aggrieved party may choose an impartial council, and will be justified in conforming to the result.

“ Thus a reasonable tribunal is established to decide on all cases of difficulty and controversy, between a minister and his people; a tribunal founded in ancient usage, resorted to in practice, and probably in many cases, but certainly in one case, in which I was counsel, supported by the opinion of all the judges of the supreme

been fully noticed under other titles (3) I shall be silent upon it in this place.

I cannot however dismiss this head without noticing two recent decisions of the supreme judicial court.

1. Persons assessed for the support of public worship in a parish, who have a right to have their moneys paid over to a minister other than the parish minister, must notify the parish of their desire to have their moneys so paid over ; and the minister must demand the moneys within a reasonable time after the assessment is made : And a year, from making such assessment, is a reasonable time ; but, in particular cases, the time may be extended.

Montague v. 1 Par. in  
Dedham. 4 Mass.  
Rep. 269.

2. A person leaving the society in which the parish <sup>held</sup> worship, and honestly and in good faith joining one of another religious denomination, is entitled to have his money paid over to the teacher, on whose instructions

judicial court. In the case of *Fuller v. the Inhabitants of Princeton*, the inhabitants had charged the minister with opposition to the independence of the United States, and with hostility to the principles of the revolution, on the success of which depended the preservation of our civil and religious privileges. They stated that they had requested Mr. Fuller's concurrence in the choice of a mutual council ; that he unreasonably refused his concurrence ; that thereupon they called an *ex parte* council, who advised to the dismissal of the minister ; and that they had dismissed him accordingly. Mr. Fuller contended that he was always willing to submit the controversy to a mutual council. On this point evidence was given on both sides. The court in their direction to the jury, instructed them, that if they were satisfied, that the town had offered Mr. *Fuller* a mutual council, and he had unreasonably refused to agree to one, then the town was justified in proceeding conformably to the result of the *ex parte* council. But if they were satisfied that Mr. *Fuller* had always been willing to submit the controversy to the result of a mutual council, then the result of an *ex parte* council, and the proceedings of the town pursuant to it, were, in law, a nullity."

(3) See title ASSESSORS, p. 132, 133. See also title ASSUMPSIT, p. 149, 150.

he attends, although he may have no conscientious scruples on the subject.

#### V. Penalty for non-attendance on public worship.

Stat. 1791, c. 58, s. 6.

By statute, any person being able of body and not otherwise necessarily prevented, who shall, for the space of three months together, absent him or herself, from the public worship of God, on the Lord's day, (provided there be any place of worship, at which he or she can conscientiously and conveniently attend,) shall pay a fine of *ten shillings*.

#### VI. Penalty for indecent behaviour in meeting ; or for disturbing a religious assembly.

Ibid. s. 7.

If any person shall, on the Lord's day, within the walls of any house of public worship, behave rudely or indecently, he or she shall pay a fine not more than *forty shillings*, nor less than *five shillings*.

Ibid. s. 8.

So if any person or persons, either on the Lord's day, or at any other time, shall wilfully interrupt or disturb any assembly of people met for the public worship of God, within the place of their assembling, or out of it, he or they shall severally pay a fine not exceeding *ten pounds*, nor less than *twenty shillings*.

Ibid. s. 13.

The above fines shall be for the use of the commonwealth. Where the penalty exceeds *forty shillings*, the offender must be indicted at the sessions.—Where the penalty does not exceed *forty shillings*, the offender, (except he lives out of the county, in which the offence may be committed) must be prosecuted before a justice of the peace in the same county. But when the offender lives out of the county, he may be prosecuted by indictment, although the penalty does not exceed *forty shillings*. (4)

(4) A charge "for behaving rudely in a meeting house," and "for interrupting public worship," cannot be joined in one count of an indictment. 2 Mass. Rep. 163. *Commonwealth v. Symonds*.

## TITLE CXXII.

## RAPE.

**RAPE** is the carnal knowledge of a woman forcibly, <sup>4 Bl. Com. 210, 212. Stat. 1805, c. 97, s. 1.</sup> and against her will ; or the unlawful and carnal knowledge and abuse of any female child under the age of ten years, whether with, or without, her consent.

A male infant, under the age of fourteen years, is presumed, by law, incapable to commit a rape, and therefore, it seems, cannot be found guilty of it. For though, in other felonies, *malice supplies the want of age*, as has in some cases been shewn ; yet, as to this particular species of felony, the law supposes an imbecility of *body* as well as mind. <sup>4 Bl. Com. 212. Age of the male.</sup>

The civil law seems to suppose a prostitute or common harlot incapable of any injuries of this kind ; not allowing any punishment for violating the chastity of her who hath indeed no chastity at all, or at least, hath no regard to it. But our law does not judge so hardly of offenders, as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment. It, therefore, holds it to be felony to force even a concubine or harlot ; because the woman may have forsaken that unlawful course of life. <sup>Ibid. 212, 213. A prostitute a subject of rape.</sup>

As to the evidence ; the party ravished is in law a competent witness ; but the credibility of her testimony must be left to the jury upon the circumstances of fact that concur in the testimony. For instance : If the witness be of good fame ; if she presently discovered the offence, and made search for the offender ; if the party accused fled for it ; these and the like are concurring circumstances, which give greater probability to her evidence. <sup>Ibid. 213. Party ravished a witness. When credible.</sup>

MAL. 513, 514.

But on the other side, if she be of evil fame, and stand unsupported by others ; if she concealed the injury for any considerable time after she had opportunity to complain : if the place where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry ; these and the like circumstances carry a strong but not conclusive, presumption that her testimony is false or feigned.

Ibid. 214.  
Testimony of a female child.

Moreover if the offence be charged to be committed on a female child, she may still be a competent witness, if she has sense and understanding to know the nature and obligations of an oath ; or even to be sensible of the wickedness of telling a deliberate lie. But no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined without oath.

1 East's C. L. 444, 445.

It is no mitigation of this offence, that the woman, at last, yielded to the violence, if such her consent were forced by fear of death or duress. Nor is it any excuse for the party indicted, that the woman consented *after* the fact ; nor that she was first taken with her own consent, if she were afterwards forced against her will. These circumstances are however to be left to the jury, more especially in doubtful cases, where the woman's testimony is not corroborated by other evidence.

Stat. 1805, c. 97, s. 1.

As to the punishment ; a rape upon a woman, or carnally knowing and abusing a female child under the age of *ten* years, is punished with death. The same punishment is inflicted on principals in the second degree and accessories before the fact.

TITLE CXXIII.

REAL ESTATES AND CHATTELS-REAL.

OF THE INJURIES TO SUCH PROPERTY; AND THE  
MODES OF REDRESS.

1. Of the several kinds of real estate ; and herein of corporeal and incorporeal hereditaments.
2. Of freehold estates ; and chattels real.
3. Of abatement of the freehold.
4. Of intrusion.
5. Of disseizin.
6. Of discontinuance.
7. Of deforcement.
8. Of the right of entry by the legal owner.
9. What will take away such right of entry.
10. Of writs of entry.
11. Of ejectment.
12. Of the writ of formedon.
13. Of the writ of right.

I. Of the several kinds of real estate ; and herein of corporeal and incorporeal hereditaments.

Things real are such as are permanent, fixed, and immoveable, which cannot be carried out of their place ; and are usually said to consist in lands, tenements, or hereditaments.

2 Bl. Com. 16.  
Things real.

*Land* comprehends all things of a permanent substantial nature ; being a word of very extensive signification.

*Ibid.*

*Tenement* is a word of still greater extent ; and though, in its vulgar acceptation, is only applied to houses and other buildings, yet in its original, proper, and legal

*Land.*

*Ibid.*

*Tenement.*

sense, it signifies every thing that may be *holden*, provided it be of a permanent nature ; whether it be of a substantial and sensible, or of an unsubstantial, ideal kind. Thus *liberum tenementum*, frank tenement, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like.

*Ibid.* 17.

Hereditament.

An *hereditament* is, by much, the largest and most comprehensive expression ; for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal, or incorporeal, real, personal or mixed.

*Ibid.*

Hereditaments distinguished into corporeal and incorporeal.

Hereditaments, then, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal consists of such as affect the senses ; such as may be seen and handled by the body : Incorporeal are not the objects of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

*Ibid.*

Corporeal hereditaments consist wholly of substantial and permanent objects, all of which may be comprehended under the general denomination of land only. For *land* comprehendeth in its legal signification, any ground, soil, or earth whatsoever ; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includeth also all castles, houses, and other buildings ; for they consist of two things ; *land*, which is the foundation, and structure thereupon : So that if I convey the land or ground, the structure or building passeth therewith.

*Ibid.* 18.

It is observable that water is here mentioned as a species of land ; which may seem a kind of solecism ; but such is the language of the law ; and therefore I cannot bring an action to recover possession of a pool, or other piece of waters, by the name of *water* only, either by calculating its capacity, as for so many cubical yards ; or, by superficial measure, for twenty acres of water, or by general description, as for a pond, a water course, or a rivulet ; but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land*

*covered with water* : for water is a moveable wandering thing, and must of necessity continue common by the law of nature ; so that I can only have a temporary, transient and usufructuary property therein : wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it ; but the land which that water covers, is permanent, fixed and immoveable ; and therefore, in this, I may have a certain, substantial property, of which the law will take notice, and not of the other.

Land hath also, in its legal signification, an indefinite <sup>Ibid.</sup> extent, upwards as well as downwards : therefore, no man may erect any building, or the like, to overhang another's land ; and downwards, whatever is in a direct line between the surface of any land, and the centre of the earth, belongs to the owner of the surface, as is every day's experience in the mining countries : so that the word "land" includes, not only the face of the earth, but every thing under it and over it : and, therefore, if a man grants all his lands, he grants thereby all his mines of metal, and other fossils, his woods, his waters, and his houses, as well as his fields and meadows : not but the particular names of the things are equally sufficient to pass them, except in the instance of waters ; by a grant of which, nothing passes but a right of fishing : but the capital distinction is this, that by the name of a castle, messuage, toft, croft or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of ; but by the name of *land*, which is *nomen generalissimum*, every thing terrestrial will pass.

## II. Of freehold estates ; and chattels real.

Estates of freehold are estates of *inheritance*, or estates <sup>Ibid. 104.</sup> *not of inheritance*. The former are again divided into inheritances *absolute* of fee simple ; and inheritances *limited* <sup>Freeholds of inheritance.</sup> *ed*, one species of which we usually call fee tail.

Ibid. 120.

Freeholds not of inheritance.

Estates of freehold, *not of inheritance*, are for life at least. When this estate is for the life of the tenant, he is then called tenant for life simply ; but this estate is sometimes granted for the life or lives of one or more third persons, in which case the grantee is called tenant *pour autre vie*, or for the life of another.

Ibid.

Of these estates for life, some are *conventional*, or expressly created by the act of the parties ; as where one by deed grants to another an estate, to hold during his own life, or for the life of another : others merely *legal*, or created by construction and operation of law. Of this latter description are such estates as a woman holds, by right of dower ; or as a man holds as tenant by the curtesy.

Ibid. 386.

Chattels-real.

Chattels real are such as concern, or savour of, the realty ; as terms for years of land, &c. And these are called real chattels, as being interests issuing out of, or annexed to, real estates : of which they have one quality, viz. immobility, which denominates them *real* ; but want the other, viz. a sufficient legal indeterminate duration : and this want it is, that constitutes them *chattels*. The utmost period for which they can last is fixed and determinate ; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life.

### III. Of abatement of the freehold.

3 Bl. Com. 167.

An *abatement* is where a person dies seized of an inheritance, and before the heir or devisee enters, a stranger, who has no right, makes entry, and gets possession of the freehold : this entry of him is called an abatement, and he himself is denominated an abator.

### IV. Of intrusion.

Ibid. 169.

An *intrusion* is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. And it happens where a tenant for

term of life dieth seized of certain lands and tenements, and a stranger entereth thereon, after such death of the tenant, and before any entry of him in remainder or reversion. This entry and interposition of the stranger differs from an abatement, in this, that an abatement is always to the prejudice of the *heir*, or immediate *devisee*; an intrusion is always to the prejudice of him in *remainder* or *reversion*. For example; if A dies seized of lands in fee simple, and, before the entry of B his heir, C enters thereon, this is an abatement; but if A be tenant for life, with remainder to B, in fee-simple, and, after the death of A, C enters, this is an intrusion. Also if A be tenant for life on lease from B, or his ancestors, or be tenant by the curtesy, or in dower, the reversion being vested in B; and after the death of A, C enters, and keeps B out of possession, this is likewise an intrusion. So that an intrusion is always immediately consequent upon the determination of a particular estate; an abatement is always consequent upon the determination of an estate in fee simple. And, in either case, the injury is equally great to him whose possession is defeated by this unlawful occupancy.

#### V. Of disseizin.

Disseizin is a wrongful putting out of him that is seized of the freehold. The two former species of injury <sup>Trad.</sup> were by a wrongful entry where the possession was *vacant*; but this is an attack upon him who is in actual *possession*, and turning him out of it. Those were an ouster from a freehold in *law*; this is an ouster from a freehold in deed.

Disseizin may be effected either in corporeal inheritances, or incorporeal. Disseizin of things corporeal, as of houses, lands, &c. must be by entry and actual dispossession of the freehold; as if a man enters, either by force or fraud, into the house of another, and turns, or, <sup>Ibid. 169, 170.</sup>

at least, keeps, him or his servants out of possession. (1) Disseizin of incorporeal hereditaments cannot be an actual dispossession; for the subject itself is neither capable of actual bodily possession, nor dispossession: but it depends on their respective natures and various kinds; being, in general, nothing more than a disturbance of the owner in the means of coming at, or enjoying it.

#### VI. Of discontinuance.

*Ibid.* 171.

By the laws of England, a *discontinuance* happens, when he, who hath an estate tail, grants to some third person a larger estate than he himself possesses in the lands entailed. But in this commonwealth, there is a statute,

(1) The following remarks are contained in the opinion of the court, as delivered by Parsons, C. J. in *Prop. Kenn. Purch. v. Springer*, 4 Mass. Rep. 416. "When a man is once seized of land, his seizin is presumed to continue, until a disseizin is proved. When a man enters on land, claiming a right or title to the same, and acquires a seizin by his entry, his seizin shall extend to the whole parcel, to which he has right; for, in this case, an entry on part is an entry on the whole. When a man, not claiming any right or title to the land, shall enter on it, he acquires no seizin, but by the ouster of him who was seized, and he is himself a disseizor. To constitute an ouster of him who was seized, the disseizor must have the actual exclusive occupation of the land, claiming to hold it against him who was seized, or he must actually turn him out of possession.

"When a disseizor claims to be seized by his entry and occupation, his seizin cannot extend further than his actual exclusive occupation; for no farther can the party seized be considered as ousted: for the acts of a wrong-doer must be construed strictly, when he claims a benefit from his own wrong.

"To constitute a disseizin of the owner of uncultivated lands, by the entry and occupation of a party not claiming title to the land, the occupation must be of that nature and notoriety, that the owner may be presumed to know, that there is a possession of the land, adverse to his title: otherwise a man may be disseized without his knowledge, and the statute of limitations may run against him, while he has no ground to believe that his seizin has been interrupted."

which so far from *redressing* such discontinuance, *encourages* it. This statute provides, that tenant in tail may aliene in fee by deed in common form ; and such alienation shall be effectual.(2)

## VII. Of deforcement.

*Deforcement*, in its most extensive sense, is *nomen generalissimum* ; a much larger and more comprehensive expression than any of the former : it then signifying the holding of any lands or tenements to which another person hath a right. So that this includes, as well an abatement, an intrusion, a disseizin, &c. as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession. But as contradistinguished from the former, it is only such a detainer of the freehold, from him that hath the right of property, but never had any possession under that right, as falls within none of the injuries which we have before explained. Ibid. 172.

If a man marries a woman, and, during the coverture, is seized of lands, and alienes, and dies ; is disseized, and dies ; or dies in possession ; and the alienee, disseizor, or heir, enters on the tenements, and doth not assign the widow her dower ; this is a deforcement to the widow, by withholding lands to which she hath a right. Ibid. 173.

In like manner, if a man lease lands to another for term of years, or for the life of a third person, and the term expires by surrender, efflux of time, or the death of the *cestuy que vie* ; and the lessee or any stranger, who was, at the expiration of the term, in possession, holds over and refuses to deliver the possession to him in remainder or reversion, this is likewise a deforcement. Ibid.

Deforcements may also arise upon the breach of a condition in law : as if a woman gives lands to a man by deed, to the intent that he marry her, and he will not when Ibid.

(2) See title **FEE TAIL**.

thereunto required, but continues to hold the lands : this is such a fraud on the man's part, that the law will not allow it to divest the woman's right of possession ; though, his entry being lawful, it does divest the actual possession, and thereby becomes a deforcement.

Deforcements may also be grounded on the disability of the party deforced : as if an infant make an alienation of his lands, and the alienee enters and keeps possession ; now as the alienation is voidable, this possession as against the infant, (or, in case of his decease, as against his heir) is, after avoidance, wrongful, and therefore a deforcement.

*Ibid.* 274.

The same happens when one of non sane memory alienes his lands or tenements, and the alienee enters and holds possession, this may also be a deforcement.

*Ibid.*

Another species of deforcement is where two persons have the same title to land, and one of them enters and keeps possession against the other : as where the ancestor dies seized of an estate in fee simple, which descends to two sisters as coparceners, and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety ; this is also a deforcement.

*Ibid.*

Deforcement may also be grounded on the non-performance of a covenant real : as if a man, seized of lands, covenants to convey them to another, and neglect or refuses so to do, but continues possession against him ; this possession, being wrongful is a deforcement.

#### VIII. Of the right of entry by the legal owner.

*Ibid.* 174, 175.

When another person, who hath no right, hath previously taken possession of lands or tenements ; in this case, the party entitled may make a formal, but peaceable, entry thereon, declaring that thereby he takes possession : or he may enter on any part of it in the same county, declaring it to be in the name of the whole : but if it lies in different counties, he must make different entries.

Also, if there be two disseizors, the party disseized must make his entry on *both* ; or if *one* disseizor has conveyed the lands to *two* distinct feoffees, entry must be made on *both* : for as their seizin is distinct, so also must be the act which divests that seizin. Ibid. 175.

If the claimant be deterred from entering, by menaces or bodily fear, he may make *claim*, as near to the estate as he can, with the like form and solemnities : which claim is in force for only a year and a day. And this claim, if it be repeated once in the space of every year and a day, (which is called *continual claim*,) has the same effect with, and, in all respects, amounts to, a legal entry. Ibid.

Such an entry gives a man seizin, or puts into immediate possession him that hath right of entry on the estate, and thereby makes him complete owner, and capable of conveying it from himself by either descent or purchase. Ibid.

This remedy, by entry, takes place in three only of the five species of ouster, viz. abatement, intrusion, and disseizin : for, as in these the original entry of the wrongdoer was unlawful, they may therefore be remedied by the mere entry of him who hath right. But, upon a de-forcement, the owner of the estate cannot enter, but is driven to his action : for herein the original entry being lawful, and thereby an apparent right of possession being gained, the law will not suffer that right to be overthrown by the mere act or entry of the claimant. Yet a man may enter on his tenant by sufferance : for such tenant hath no freehold, but only a bare possession ; which may be defeated, like a tenancy at will, by the mere entry of the owner. Ibid.

#### IX. What will take away such right of entry.

In case of abatement, intrusion, or disseizin, where entries are generally lawful, this right of entry may be *toll*ed, that is, taken away, by descent. Ibid. 176.

Ibid.

Descents, which take way entries, are when any one, seized, by any means whatsoever, of the inheritance of a corporeal hereditament, dies, whereby the same descends to his heir: in this case, however feeble the right of the ancestor might be, the entry of any other person who claims title to the freehold, is taken away; and he cannot recover possession against the heir by this summary method; but is driven to his action to gain a legal seizure of the estate. And this, first, because the heir comes to the estate by act of law, and not by his own act; the law therefore protects his title, and will not suffer his possession to be divested, till the claimant hath proved a better right. Secondly, because the heir may not suddenly know the true state of his title: and therefore the law, which is ever indulgent to heirs, takes away the entry of such claimant as neglected to enter on the ancestor, who was well able to defend his title; and leaves the claimant only the remedy of an action against the heir. And, lastly, it is agreeable to the dictates of reason, and the general principles of law.

Ibid. 176, 177.

For, in every complete title to lands, there are two things necessary; the possession or seizen, and the right of property therein. Now, if the possession be severed from the property, if A has the right of property, and B, by some unlawful means, has gained possession of the lands, this is an injury to A; for which the law gives a remedy, by putting him in possession, but does it by different means according to the circumstances of the case. Thus as B, who was himself the wrongdoer, and hath obtained the possession by either fraud or force, hath only a *bare* or *naked possession*, without any shadow of right; A, therefore, who hath both the *right* of property and the *right* of possession, may put an end to his title at once, by the summary method of *entry*. But if B, the wrongdoer, dies seized of the lands, then B's heir advances one step farther towards a good title: he hath not only a *bare possession*, but also an apparent *right* of possession.

For the law presumes, that the possession, which is transmitted from the ancestor to the heir, is a rightful possession, until the contrary be shewn; and therefore the mere entry of A, is not allowed to evict the heir of B; but A is driven to his action at law to remove the possession of the heir, though his entry alone would have dispossessed the ancestor.

So that in general it appears, that no man can recover possession by mere entry on lands, which another hath by descent. Yet this rule hath some exceptions, wherein those reasons cease, upon which the general doctrine is grounded; especially if the claimant were under any legal disabilities, during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, &c. in all which cases, there is no neglect or *laches* in the claimant, and therefore no descent shall bar, or take away his entry. Ibid. 177.

And this title of taking away entries by descent, is still farther narrowed by the statute 32 Hen. VIII, c. 33, which enacts, that if any person disseizes or turns another out of possession, no descent to the heir of the disseizor shall take away the entry of him that has right to the land, unless the disseizor had peaceable possession five years next after the disseizin. But the statute extendeth not to any feoffee or donee of the disseizor, mediate or immediate. Ibid. 1:7, 178.

As to the time, within which an entry must be made, it is enacted by statute, that no person, unless by judgment of law, shall, at any time thereafter, make any entry into any lands, tenements, or hereditaments, but within twenty years next after his right or title first descended or accrued to the same; and in default thereof, such person, so not entering, and his heirs, shall be utterly excluded and disabled from making such entry thereunto. *Provided always*, that when any person that is, or shall be, entitled to make an entry into lands, tenements, or hereditaments, shall, at the time the said right or title first descended, accrued, or fell, be within the age of Stat. 1786, c. 13, s. 4.

twenty-one years, feme-covert, non compos, imprisoned, or beyond seas, or without the limits of the United States, that then such person shall, and may, make such entry at any time within ten years after the expiration of the said twenty years aforesaid, and not afterwards.

#### X. Of writs of entry.

3 Bl. Com. 130.

Writs of entry are brought to disprove the title of the tenant or possessor, by shewing the unlawful means by which he entered or continues possession.

*Ibid.* 181.

In the ancient books, there is frequent mention of the *degrees* within which writs of entry are brought. If they be brought against the party himself that did the wrong, then they only charge the tenant himself with the injury: but if the intruder, disseizor, or the like, has made any alienation of the land to a third person, or it has descended to the heir, that circumstance must be alleged in the writ, for the action must always be brought against the tenant of the land; and the defect of his possessory title, whether arising from his own wrong, or that of those under whom he claims, must be set forth.

*Ibid.*

One such alienation or descent makes the first degree, which is called the *per*, because then the form of a writ of entry is this, that the tenant had not entry but by the original wrongdoer, who alienated the land, or from whom it descended, to him. A second alienation or descent makes another degree called the *per* and *cui*; because the form of a writ of entry, in that case, is, that the tenant hath not entry, but *by* or *under* a prior alienee, to *whom* the intruder demized it.

*Ibid.* 132.

These degrees thus state the original wrong, and the title of the tenant who claims under such wrong. If more than two degrees, (that is, two alienations or descents) were past, there lay no writ of entry at the common law. For, as it was provided, for the quietness of men's inheritances, that no one, even though, he had the true right of possession, should enter upon him who had the

parent right, by descent or otherwise, but he was driven to his writ of entry to gain possession ; so after more than two descents or two conveyances were passed, the demandant, even though he had the right both of possession and property, was not allowed this *possessory* action ; but was driven to his *writ of right*, a long and final remedy, to punish his neglect in not sooner putting in his claim, while the degrees subsisted, and for the ending of suits, and the quieting of all controversies. But by the statute of Marlbridge, 52 Hen. 3, c. 30. it is provided, that when the number of alienations or descents exceed the usual degrees, a new writ should be allowed without any mention of degrees at all. And, accordingly, a new writ has been framed, called a writ of entry in the *post*, which only alleges the injury of the wrong-doer, without deducing all the intermediate titles from him to the tenant. Stating it in this manner, that the tenant had not entry, unless *after* or subsequent to the ouster or injury done by the original dispossessor ; and rightly concluding, that if the original title was wrongful, all claims derived from thence must participate of the same wrong.

### XI. Of ejectment.

In England, the action of trespass in ejectment, lieth where lands or tenements are let for a term of years, and afterwards the lessor, reversioner, remainder-man, or any stranger, doth eject or oust the lessee of his term. Ibid. 199.

In this state, the action of ejectment is a very extensive remedy, as appears by the following note. (3)

(3) In a work, entitled "PRECEDENTS OF DECLARATIONS," page 288, the following account is given of actions of ejectment in this state.

"Two material questions may be made on this subject. First, as to the nature, force and effect of this action, as now, and for a long time past, used in our courts. Second, as to the time and manner in which this action may be brought.

"An ejectment in our form, is a mixed action, chiefly, however, of a real nature, as it constantly concerns real property, whereby

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## XII. Of the writ of formedon.

Ibid. 192.

A *formedon* is in the nature of a writ of right, and is the highest action that tenant in tail can have : for he cannot the demandant claims title to have any lands, tenements, &c. in fee simple, fee tail, or term of life. The damages claimed for the personal injury, by the amotion or dispossession of the demandant, being mere matter of form, in this respect it differs very much from the action of *trespass and ejectment* ; the declaration in this latter action supposing only a term of years in the plaintiff, and the judgment to recover the term : and the writ of possession thereupon is not warranted by the original writ, nor prayed by the declaration, which is calculated for *damages merely*. 3 Bl. Com. 200. An action of trespass and ejectment is now, however, joined as a mixed action, and has been so, ever since the practice of this incidental judgment, as it may be called, of restitution of the land. The declaration in the action of trespass and ejectment rests upon the personal injury, viz. the trespass : and practice has extended the judgment on the action, in order to make it a complete redress to the complaint, to a restitution of the lands. But the law has never extended this legal fiction (for such it certainly is) to bar either party of those legal advantages to which they are entitled, upon the supposition that this action is strictly *personal* ; and hence a judgment in this action, so far as it concerns the lands, to which it relates merely by fiction, is never final ; either party being at liberty to allege a personal wrong, and each wrong inducing a new inquiry into the title, without recurring to the former judgments. Sull. Law Lec. 317. 3 Bl. Com. 117. Co. Litt. 153, 6, 198. In this circumstance, the difference of the forms of an action of ejectment in our courts, and the action of trespass and ejectment, has a very material effect.

“ The form of an ejectment, as it is called with us, is in two manners. First, it either disproves the title of the deforciant, and so establishes the title of the demandant, on the want of right of the tenant ; or, second, the demandant shews his own title, and on proof thereof, if a good one, has judgment : and in both cases, the land is the subject of the writ, and the disseizin is as fully set forth, as in any of the old real actions, though damages are demanded for the personal wrong ; the consequence of which is, that the fact of the disseizin, and the right of the parties, are, in substance, as well as form, determined by the verdict and judgment ; and one

not have an absolute writ of right, which is confined to such only as claim in fee simple; and for that reason

determination is a bar to all future claims on the same grounds. And the rule in this case is, *nemo bis vexari debet, si constat curie quod sit pro et eadem causâ*. 6 Co. 7. Hob. 4. 1 Vent. 170. And so is the law, according to our form; subject, however, in its application, to the exception which takes place in all other actions, viz. that a bar in one real action is not a bar to an action of a higher nature.

“An action of trespass affirms the possession, and an action of trespass and ejectment declares an injury done to the possession of the plaintiff, and is confined to a real or fictitious injury of this kind; and the fiction is never allowed, only where such an injury to the plaintiff's possession may be legally supposed, as where the plaintiff has an *actual right of entry*. But an action of ejectment, on the contrary, in our law, disproves the possession of the plaintiff. It lies where he shews himself never to have been in possession, or where he declares on the seizin of his ancestor. It rests on the wrongful possession of the tenant, or affirms the tenant's right of possession; and rests on his defective title, or the validity of the demandant's title. It seems, therefore, to lie for tenant in tail, after discontinuance, or upon the seizin of the demandant himself, after a descent cast, and the right of entry lost; in neither of which cases would trespass and ejectment lie. 2 Bac. Ab. 171.

“The above diversities being allowed, but little argument is necessary to prove the impropriety of applying the maxims of law, which have been adopted with regard to the latter action, to the ejectment of our own courts. Ours is not a personal action, in which damages are required for an injury to real property; but is a real action, in which real property is demanded, and the damages only incidentally alleged, as in a few actions at common law. The nature of the demand is fully set forth in the proceedings; and from the record of an action of ejectment, it is apparent, what points are determined by a verdict and judgment, which are, therefore, a bar to any future action prosecuted on the same ground, or in the same degree, as it is expressed in real actions. As the possession of the demandant is no ways essential, so neither is the right of entry. But the action is not without its limitations in this respect, which we shall consider herein after.

“As to the time and manner in which this action of ejectment may be brought, we may observe, that our writs of ejectment are

this writ of formedon was granted by the statute *de donis*, and is, therefore, emphatically called *his* writ of right. This writ is distinguished into three species ; a formedon in the *descender*, in the *remainder*, and in the *reverter*.

This.

A writ of formedon in the *descender*, lies where a gift in tail is made of lands, and the tenant in tail is disseized of them, and dies ; in such case the heir in tail shall have

in the nature of real actions, and comprehend all those of the ancient common law, the writ of right, the writ of assize, and the writs of entry, in their various degrees and several distinctions, in point of form. They are made conformable to the modes of proceeding established by law in courts of justice, and do not in any other circumstance, except of a greater latitude in the pleadings, differ from these ancient actions of the common law. The demandant in ejectment may declare on the mere right, which is in the nature of a writ of right ; on a gift in tail, which is in the nature of a formedon, whether in descender, remainder, or reverter : so on seizin of an ancestor, which is in the nature of mort de ancestor : on his own seizin, which is in the nature of assize of novel disseizin : on the defective title of tenant, through the several degrees of entry ; or upon disseizin of the tenant or his ancestors ; or in both these cases, upon his own seizin ; or *cum titulo*, upon the demandant's ancestor's seizin. And by Mass. Law, July 4, 1786, the limitations of time within which these may be brought, are established : so that no action can be maintained on any writ of right, upon an ancestor's possession or seizin, beyond *sixty years* : upon any writ of entry upon disseizin of ancestor, or any *possessory* action upon the possession or seizin of an ancestor, beyond *fifty years* : upon his or their own seizin or possession, by any person or body politic, beyond *thirty years* ; and all these, from the teste of the writ or bringing the action : upon *formedon in descender, remainder, or reverter*, beyond *twenty years* after the title or cause of action first descended : upon an *entry into lands*, beyond *twenty years* next after the right or title of entry descended or accrued ; saving, however, in *formedons* and *entry into lands*, *ten years* beyond the said *twenty*, to sue for or make such entry into lands, unto infants, feme coverts, persons non compos, imprisoned, beyond seas, or without the limits of the United States, at the time the said right or title first descended, accrued or fell."

this writ to recover the lands so given in tail, against him who is then the actual tenant of the freehold. (4)

A formedon in the *remainder* lieth, where a man giveth lands to another for life, or in tail, with remainder to a third person, in tail or in fee; and he who hath the particular estate, dieth without issue inheritable, and a stranger intrudes upon him in remainder, and keeps him out of possession; in this case, the remainder-man shall have his writ of formedon in the remainder, wherein the whole form of the gift is stated, and the happening of the event upon which the remainder is founded. This writ is not given, in express words, by the statute *de donis*; but is founded upon the equity of the statute, and upon this maxim of law, that if any one hath a right to the land, he ought also to have an action to recover it.

A formedon in the *reverter* lieth, where there is a gift in tail, and afterwards by the death of the donee or his heirs without issue of his body, the reversion falls in upon the donor, his heirs, or assigns, in such case the reversioner shall have this writ to recover the lands, wherein he shall suggest the gift, his own title to the reversion derived from the donor, and the failure of issue, upon which his reversion takes place.

### XIII. Of the writ of right.

A *mere writ of right* is, in its nature, the highest writ in the law, and lieth only for an estate in fee simple, and not for him who hath a less estate. This writ lies *concurrently* with all other real actions, in which an estate in fee simple may be recovered; and it lies also *after* them, being, as it were, an appeal to the mere right, when judgment hath been had, as to the possession, in an inferior possessory action. But though a writ of right may be brought, where the demandant is entitled to the posses-

(4) In England this writ lies where tenant in tail has aliened the estate, and died: but, in this state, such tenant may, by statute aliene the estate in fee by deed in common form.

sion, yet it rarely is advisable to be brought in such cases; as a more expeditious and easy remedy is had, without meddling with the property, by proving the demandant's own or his ancestor's possession, and their illegal ouster, in one of the possessory actions. But, in case the right of possession be lost by length of time, or by judgment against the true owner in one of these inferior suits, there is no other choice; this is then the only remedy that can be had; and it is of so forcible a nature, that it overcomes all obstacles and clears all objections that may have arisen to cloud and obscure the title. And after issue once joined in a writ of right, the judgment is absolutely final; so that a recovery had in this action may be pleaded in bar of any other claim or demand.

TITLE CXXIV.

RECOGNIZANCE.

**A** RECOGNIZANCE is an obligation of record, which a man enters into before some court of record, or magistrate duly authorized, with condition to do some particular act. 2 Bl. Com. 341.

A recognizance may be either public or private. A public recognizance is where the act to be performed is of a public nature ; as to appear as a witness, at some court ; or to appear and answer for some offence. A private recognizance is where one man acknowledges himself indebted to another in a sum certain. In such case, the debtor is called the *conusor*, and the creditor, the *conusee*. It is these last recognizances, better known in the country by the name of *confessions*, of which I shall take notice under the present title.

1. Of the form and effect of recognizances ; and the magistrates before whom they may be taken.

2. Of the conusee's right to execution ; and the time within which the same may issue.

3. The officers to whom such execution may be directed ; and the places into which it may run.

4. Of the change of debt, by the death of any of the original parties ; and how, in such case, the execution shall be varied.

5. Proceedings by which to recover the contents of a recognizance when the time for taking out execution has elapsed.

6. Proceedings by which to recover the contents of a recognizance, when the magistrate who took the same is dead ; or removed from the commonwealth.

7. Fees of the magistrate.

I. Of the form and effect of recognizances; and the magistrates before whom they may be taken.

Stat. 1782, c. 21, s. 1.

Justices of the peace empowered to take recognizances.

Every justice of the peace for any county in this commonwealth, shall severally have power and authority, within his county, to take recognizances for the payment of debts, of any person or persons (by law capable of binding him or herself,) who shall come before him for that purpose, according to such form, or according to the effect and meaning of such form as is prescribed by the act.

See Append. No. 2.

The form of this recognizance may be seen in the appendix.

Stat. 1782, c. 21, s. 2.

Mode of taking such recognizances.

Every such recognizance shall be made and written on a piece of paper or parchment; and the justice of the peace taking the same, shall immediately cause it to be fairly recorded at large, in a book to be therefor by him provided and kept; which original recognizance, after the same shall be recorded, at the request of the conusee or conusees, or of the person or persons to whom the remedy or executive process on such recognizance shall by law accrue, (in case of the decease of any or all of them,) shall be delivered to him or them so requesting it.

Ibid.

Effect of such recognizances.

And every conusee or conusees, his or their legal representative or representatives, for default of the payment of such debts contained in the recognizances, or any part of such debts by the time therein set and expressed for the payment thereof, shall have in every point, respect, and degree, against the conusor or conusors, the survivor or survivors of them, his or their heirs, executors, or administrators, and the heirs, executors, or administrators of the last survivor of such conusors, (where there shall be such) the like process or processes, action and remedy, execution or executions, alias or pluries, as hath been hitherto had, used and accustomed, and may at this time be lawfully had, used, done, or made against them respectively, of and upon a judgment of

any court of record in this commonwealth on an action of debt in full force, unreversed and not satisfied.

II. Of the conusee's right to execution ; and the time within which the same may issue.

For the speedy obtaining of such debts, the justice of the peace who took such recognizance, at any time within three years from and after the day set and expressed therein, for the payment of the debt or any part thereof, expressed in such recognizance, at the request of the conusee or conusee's, named therein, or in case of their death, at the request of the person or persons to whom the remedy, or chose in action thereon, shall be cast by law ; and upon his or their producing and delivering to him such original recognizance uncanceled, and without any receipt of payment or satisfaction of the sum alleged to be then payable and due, underwritten or indorsed, and lodging the same with the said justice, he shall award and make out on such recognizance, a writ or process of execution for the levying of the whole sum, which by such recognizance and receipts, (if any there be) entered thereupon, appear to be then due and payable, of the same nature and effect, against the body or bodies, and estate real and personal of the conusor or conusors, as by the laws of this commonwealth a judgment creditor is entitled to have for the levying and satisfying any sum or sums of money, recovered and due to him, by the judgment of any court of record in this commonwealth, on an action of debt in full force.

III. The officers to whom such execution may be directed ; and the places into which it may run.

And such process for the execution of such recognizance, may and shall be directed to, executed and returned by, all and every such officer and officers as the writ or process for the execution of the judgment of any court

*Ibid.*

To what officers the execution may be directed.

of record, by the law of this commonwealth, may and ought to be directed to, and returned by.

*Ibid.*

Power and duty of such officers.

Liability of such officers, for misfeasance or malfeasance, in regard to such execution.

And every such officer and officers for any town or county in this commonwealth, shall have the like power and authority, and shall be under the like obligations in all respects and regards whatsoever, to execute and return such writ or process made upon such recognizance by such justice of the peace, as he or they by law have, and are under, to execute and return a writ of execution on any judgment of a court of record, in an action of debt; and shall be subject and liable to all the like action and actions for any fraud or falsehood, neglect, misfeasance, and malfeasance in, or concerning the executing or returning of any such process for the executing of such recognizance aforesaid, as he or they by law are liable and subject to for any defaults, neglects, frauds, falsehoods, delinquences, or errors whatsoever, touching, concerning, or in anywise relating to the execution or return of any writ or process on any judgment of a court of record in an action of debt.

*Ibid.*

Into what places such execution may run.

And every writ or process for the executing such recognizance, may run into any county or place in this commonwealth, and may and shall there be executed by the officer or officers of such county, town, or place by law having the execution and return of writs, to whom it shall be directed.

*Ibid.*

Form of the execution.

And the writ or process for the executing of such recognizance, shall be in the form, or to the effect and meaning of the form which is prescribed by the act.

See Append. No. 3.

The form of this execution may be seen in the appendix.

IV. Of the change of debt, by the death of any of the original parties; and how in such case, the execution shall be varied.

In case at the time of awarding such writ of execution, there shall, by reason of death, happen to be any change

Stat. 1782, c. 21, s. 3,

of the person or persons who by law shall have the right to sue out the same, or of the persons chargeable with the payment of the contents of the recognizance, from the time when it was taken; the form of the writ shall be so varied from the form prescribed in the act, as to make it take effect, according to the operation of the law upon the case at the time of the writ's issuing.

How the writ shall be varied in case of the death of either the parties.

In what manner soever the chose in action may be changed by the death of one or more of the conusee's, the property and interest in the debt shall always in that case vest in such person or persons as a debt which is due to joint-merchants does by the law-merchant; and the right of survivorship shall not take place with regard to the property in the debt.

Ibid.

Survivorship shall not take place on the death of one of the conusees.

No execution of this sort shall be awarded in such form as to make the body or bodies of the heir or heirs at law, of the conusor or conusors, or the proper goods or estate of the executors or administrators, liable to be taken in satisfaction of the said writ: but in case of the death of any of the conusor or conusors of this sort, such writ shall run against such person, persons and estate, as a writ of execution on a judgment of a court of record in an action of debt, would by law run, in case the judgment debtor or debtors, or any of them, were dead.

Ibid. s. 4.

Neither the body of the conusor's heir, nor the goods of his executor, etc. liable on such execution.

And every person or persons that shall be grieved and injured by the wrongful suing out and executing of any writ or process of execution of this sort, shall have all the like remedy and remedies in the law, as in case a writ of execution on any judgment of a court of record in debt had been unjustly and wrongfully sued out and executed upon him or them.

Ibid.

Remedy, in case of a tortious suing out of execution.

V. Proceedings by which to recover the contents of a recognizance, when the time for taking out execution has elapsed.

In case at any time it should happen, that three full years shall have elapsed from and after the time set and

Ibid. s. 5.

*Scire facias.*

The original recognizance to be filed.

limited in and by such recognizance for the payment of the contents thereof, without any payment made and underwritten or indorsed, and without any writ of execution having been sued out thereon; or in case any payment or payments in part shall have been made and underwritten, or indorsed at any time or times after the time set and expressed for the payment of the contents, and three years shall have elapsed from and after the last of such payments, and no writ of execution shall have been sued out within three years from the last payment; no writ of execution shall be awardable in either of such cases, until a writ of *scire facias* shall have been sued out from a court in which by law an original action for a like sum might have been brought and served, and return thereof made as is by law directed; but after that shall have been done, and upon the defendant's non-appearance, or not shewing sufficient cause, and the plaintiff's producing and filing the original recognizance in the court from which the *scire facias* issued, the court shall proceed to award execution for what shall appear to be due on such recognizance with lawful costs.

VI. Proceedings by which to recover the contents of a recognizance, when the magistrate who took the same is dead; or removed from the commonwealth.

*Ibid.* s. 6.

In case of the death of the justice of the peace, who shall have taken any such recognizance, or of his removal out of the commonwealth or otherwise, where no writ of execution thereon has been sued out, and returned satisfied; in every such case, any creditor or creditors who shall have any such recognizance taken before any such deceased or removed justice, and shall file the same in the court of common pleas for the county where either the creditor or debtor dwells, shall be entitled to sue out a writ of *scire facias* thereon: and the debtor being served with such writ, and not appearing or shewing sufficient

cause why execution should not be had, the court shall proceed to award execution for what shall appear to be due with lawful costs.

VII. Fees of the magistrate.

The fees to the justice of the peace who shall take recognizances pursuant to the act, shall be as followeth : Ibid. s. 8.

1. For taking and attesting any such recognizance, be the number of conusors or conusees more or less, *one shilling and sixpence*, and no more. Ibid.

2. For recording such recognizance, *one shilling*, and no more. Ibid.

3. For the writ of execution on such recognizance, *one shilling and sixpence*, and no more. Ibid.

**TITLE CXXV.**

**REFERENCE AND REFEREES.**

1. **O**F the manner and form of a submission to referees.
2. Of the validity and invalidity of submissions, by reason of the referees, the parties, or the subject matter.
3. The requisites necessary to constitute a good award.
4. At what court and at what time, referees must make return of their award; and herein of the judgment upon such award.
5. In what cases there may be a settlement of the award, previous to the return thereof.
6. Power of referees.

**I. Of the manner and form of a submission to referees.**

A submission of a controversy, to the determination of referees, may be either by a rule of court; in which case it becomes a record of the court; or it may be by agreement entered into between the parties before a justice of the peace. This latter mode of submission is the most usual, and the manner and form of it are prescribed by stat. 1786, c. 21.

Sec. 1.

This statute directs, that when any persons who may have a dispute, of what nature soever, shall agree to have the dispute determined by referees, mutually chosen by the parties for the purpose, it shall be lawful for the person or persons making the demand in the action, to make out a particular statement thereof, under his or their hands, in writing, and to lodge the same with some one

justice of the peace of the county in which the person or persons, making the demand, may dwell.

And the justice, upon application of the parties for the purpose, shall make out an agreement to be annexed to the aforesaid demand, and to be by them or their lawful agents or attorneys, subscribed and acknowledge, in substance, as prescribed by the act. (1)

The form of the submission may be seen in the appendix. See Appendix, No. 4.

And there shall be paid by the person or persons making the demand, in the action, *two shillings* unto the justice of the peace, that may make out the agreement, and take the acknowledgment thereof: which sum shall be added to the costs that may arise in the action, for the determination of which, the agreement and acknowledgment were made. Stat. 1785, c. 21, s. 2.

II. Of the validity and invalidity of submissions, by reason of the referees, the parties, or the subject matter.

Such and such only as are legally capable of making contracts, can be legal parties to a submission. A wife must, therefore, submit by her husband, and an infant by his guardian. 1 Bac. Abr. 156.

An executor or administrator may submit a claim which he has in his *individual* capacity, against the estate of the deceased.

By statute, when an executor or administrator shall exhibit a claim in writing, against his testator or intestate, to the judge of probate, having cognizance thereof, for allowance, and the same shall be disputed by any person interested adversely in the allowance thereof, it shall Stat. 1789, c. 11, s. 3.

(1) If no demand be annexed to the submission, it is error.

*Bullard v. Coolidge*, 3 Mass. Rep. 324.

So if the demand annexed, be not subscribed by the party making it, it is error.

*Mansfield v. Doughty*, 3 Mass. Rep. 398.

See also *Jones v. Hacker*, 5 Mass. Rep. 264.

be lawful for the said executor or administrator, and the legatees or heirs, whose interest will be affected by the issue thereof, to submit the determination of such claim to referees, who may be mutually agreed upon by the parties interested.

*Ibid.*

And the court of probate, before whom such submission is made, may receive, approve and allow the report of such referees, made in writing, pursuant to the submission, and decree accordingly. *Provided*, the submission be made in writing, and signed by all the parties interested therein, or their agents, duly authorized thereunto; and when any of the parties are minors, by his or their guardians, duly nominated and appointed.

*Dana v. Prescott,*  
1 Mass. Rep. 200.

But no claim of an executor or administrator can be submitted, other than such as he has in his *individual* capacity. The statute does not authorize the judge of probate to allow a reference of any demand, which an executor or administrator, in his *representative* capacity, has against the estate of the deceased.

*Stat. 1789, c. 11, § 2.*

When, however, a dispute arises respecting the occupation, use and improvement of real estate, in the hands of the executor or administrator, and the quantum he ought to credit in his account therefor, it shall be lawful for the judge of probate to appoint three disinterested persons living near to the estate to ascertain the true value thereof; and the report of them, or the major part of them, made thereupon in writing, after hearing the parties, and accepted by the judge, shall be the sum the executor or administrator shall be charged with in his account, and no more.

So likewise may the executor or administrator of an *insolvent* estate, submit the claim of a creditor to the determination of referees; where such claim has been allowed by the commissioners; but with which allowance such executor or administrator is dissatisfied.

*Stat. 1784, c. 2.*

In such case, it is provided by statute, that in case the executor or administrator shall be dissatisfied with any

creditor's claim allowed by the commissioners, and shall give notice thereof at the probate office, and also to the creditor, within twenty days after the commissioners' report, such claim shall, by the judge of probate be struck out of the commissioners' report, unless such creditor shall commence and prosecute, at the common law, his claim as aforesaid, as speedily as the same can be done; or unless the creditor and the executor or administrator shall agree, before the judge, to submit the same to reference; in which case, the determination of the referees shall be final.

Regularly, an action in the name of a judge of probate on an administration bond, cannot be referred; for the judge of probate is a mere trustee of an administration bond, for all the next of kin and creditors.

Thomas v. Leach  
et al.  
2 Mass. Rep. 182.

But when a suit is brought on the bond, for the benefit of the party endorsing the writ, and who is entitled to have execution for his own use, and the penalty is declared forfeited; in such case, the indorser and defendant may submit to referees to report the sum for which the execution shall issue for the use of the indorser, who is a party to the submission: in which case, *judgment* is rendered for the penalty for the judge, in his official capacity, and *execution* awarded according to the report.

Ibid.

As to who may and who may not legally be a referee; inasmuch as the parties are supposed to exercise their discretion in the choice of their judges, the law has not been very industrious in searching for incapacities. And it is said, that infants and married women may be appointed.

2 Swif. Syst. L. C. 13.

It has, however, been decided, that the justice, who takes the acknowledgment of the parties to the submission, cannot be one of the referees.

Drew v. Canady,  
1 Mass. Rep. 186.

As to what is a proper subject matter of submission:—criminal causes cannot be submitted; because they ought to be punished for the public good.

1 Bac. Abr. 132.

2 Swif. Syst. L. C. 12. But any private damages to which a person is legally entitled, by reason of a criminal act, may be submitted.

1 Bac. Abr. 133.

Neither can matrimonial causes be submitted; because marriage ought to be free, and is of that solemn and important nature, that it cannot be dissolved but by sentence of law.

Ibid.

But the damages a person has sustained by a breach of promise of marriage, or any thing relating to a marriage portion, may be submitted.

III. The requisites necessary to constitute a good award.

Ibid. 139.

1. To constitute a good award, it must, in the first place, be made according to the submission.

Ibid.

Tudor v. Peck,  
4 Mass. Rep. 242.

If an award be made of any other thing than what is contained in the submission, it is void; for an award under any agreement of submission, must be upon the matters only contained in such agreement.

1 Bac. Abr. 142.

2. A second necessary constituent of a good award, is that it be *certain*.

Ibid. 143. in nota.  
Cites Skin. 246.

Hence an award to pay so much money as certain lands are worth is void, for its uncertainty.

But though the sum awarded be in itself uncertain, yet if it be of such a nature, that it can be reduced to certainty, the award is deemed good in law.

Ibid.

Hence, to pay the charges of such a suit, is good; because it is the intent of the referees, that it should be reduced to a certainty. And an award to pay such costs as are taxed by the court, has been always held good.

Ibid. 146.

3. A fourth incident to a good award, is, that it be of a thing *lawful* and *possible*. The reason of this rule cannot but be obvious to every mind.

Ibid. 147.

4. Lastly; an award must be final. For this reason, a conditional award is not good; because not final to determine matters in difference.

IV. At what court and at what time, referees must make return of their award ; and herein of the judgment upon such award.

The award of referees, appointed by agreement entered into before a justice of the peace, must be returned to the then *next* court of common pleas, to be holden in and for the county in which the justice may have lived at the time he issued the agreement.

Stat. 1785, c. 21, s. 2.

In *Durell v. Merrill*, it appeared by the record, that the award was made on the 28th day of October, 1802. It further appeared, that this award was returned at the common pleas, the session whereof commenced on the twenty-sixth day of the same October ; and judgment was rendered according to the award. On a writ of error brought, judgment was reversed : because the return of the award was not at a court which commenced its session next *after* the award made, but at a court, the session of which had commenced *before* the award made ; for the word "*next*" relates *back* to the time of the award, and *forward* to the term of the court.

1 Mass. Rep. 411.

The above decision, however, applies only to original awards, and not to such as are made after a recommitment. Neither does it apply to awards by referees appointed by a rule of court ; but is confined to such only as are made by referees, constituted by virtue of an agreement before a justice. (2)

The common pleas, to whom the report of the referees may be made, shall have cognizance thereof, in the same way and manner, and the same doings shall be had thereon, as though the same had been made by referees appointed by a rule of the same court.

Stat. 1786, c. 21, s. 3.

If it appear, by the agreement of the parties, that the award of the referees shall be final, in such case, no appeal lies from the common pleas. And this law applies

Stat. 791, c. 42.

(2) See *Whitney v. Cook*, 5 Mass. Rep. 139.

## REFERENCE AND REFEREES.

as well to such awards as are in pursuance of a rule of court, as to those which are made by referees appointed according to the statute.

V. In what cases there may be a settlement of the award, previous to the return thereof.

Stat. 1786, c. 21, s. 4.

Where the parties shall agree, that the determination of the referees may be made known prior to its being made to the common pleas; in such case, it shall be lawful for the referees to make known the determination to the parties, without its affecting, in any degree, the validity thereof.

Ibid.

And if the determination be so made known to the parties, it shall be lawful for the party who may be found indebted, agreeably to the determination aforesaid, to discharge him or themselves therefrom, and thereby prevent any further process thereon, by paying the same unto the person or persons, to whom it may be so awarded, and having his or their receipt therefor on the back of the determination aforesaid: in which case, the determination and papers accompanying the same shall be returned to the common pleas, to be recorded by the clerk of said court, in the same manner as though the money had not been paid as above mentioned.

## VI. Power of referees.

Ibid. s. 5.

The referees that may be appointed in pursuance of the statute, shall be vested with all the power and authority that referees have been or may be vested with who are appointed by a rule of court. And witnesses shall be summoned to appear before them and sworn, in the same manner as is or may be prescribed by law for summoning witnesses before referees appointed by a rule of court.

TITLE CXXVI.

REGISTER OF DEEDS.

1. **O**f the time and manner of choosing registers of deeds ; and herein of their qualifications.

2. Of the return of the votes ; and the manner in which registers must qualify themselves for office.

3. Proceedings when, in any election, no one candidate has a majority of the votes returned.

4. Of the power and duty of clerks of the common pleas, to act in the office of registers of deeds, during a vacancy.

5. Mode of choosing registers in case of a vacancy.

6. The mode of removing registers for misconduct.

I. Of the time and manner of choosing registers of deeds ; and herein of their qualifications.

By statute 1783, c. 60, s. 1, it is enacted, that there shall be chosen to this office, in each county within this commonwealth, by the written votes of such persons as are, by the constitution, qualified to vote for representatives in the several towns, at their respective annual town-meetings, in the month of *March*, one thousand seven hundred and eighty six, some discreet, suitable person, (1) having a freehold within the same county, of the annual income of *ten pounds* at the least ; the votes to be counted and sorted in the town-meeting, by such persons as shall be chosen to count and sort the votes for that meeting ; the names of the persons voted for, and

Manner of choosing registers of deeds.

(1) No clerk of any court of common pleas, or of the supreme judicial court, shall, at the same time, be the register of deeds for any county.

the number of votes each person had, shall be recorded by the town clerk, in the town book.

For what time such registers are chosen.

By the same statute s. 5, it is further enacted, that the qualified voters as aforesaid, in each respective town within this commonwealth, at their annual meeting in *March*, seventeen hundred and ninety-one, and every five years from thence successively following, forever, at their several town-meetings in *March*, shall be, and are empowered and required, to proceed to choose a register of deeds for each county respectively within the commonwealth, qualified as in the act directed, the manner and determination of the choice, initiation into office, and the duties and obligations he shall be under while in office, to be the same as is expressed in the act.

II. Of the return of the votes; and the manner in which registers must qualify themselves for office.

Stat. 1783, c. 60, s. 1.

Return of the votes.

An attested copy of the record of the votes shall be transmitted, under seal, to the next court of general sessions of the peace, to be held within and for the county, on the first day of the court's sitting there, to be opened and compared with the like returns from the several towns in such county.

*Ibid.*

Registers of deeds must be sworn, and give bonds.

And the person having the majority of the said votes, and accepting of the said office, after being sworn to the faithful discharge of the trust, before the supreme judicial court, or court of common pleas, court of sessions, or two justices of the peace within the county, *quorum unus*, and giving bond to the clerk of the sessions of the peace, in the said county, with two sureties, in the sum of *five hundred pounds*, for the faithful discharge of his trust, shall be and continue in the said office five years, and until some other person shall be chosen and qualified in like manner in his stead, unless sooner removed or displaced by order of the court of general sessions of the peace in such county, for misconduct in the discharge of his duty.

## REGISTER OF DEEDS.

And the person so chosen and qualified as aforesaid, shall reside and keep his office daily open in the shire town of the county, and therein keep the books, records, files, and papers to the said office belonging.

*Ibid.*

At what place the records are to be kept.

III. Proceedings when, in any election, no one candidate has a majority of the votes returned.

By statute it is enacted, that if upon comparing the votes that may be collected in *March*, one thousand seven hundred and eighty-six, or in the month of *March* at any period five years afterwards, no person shall be chosen by a majority of the votes returned, the court of sessions shall issue their warrants to the selectmen of the several towns, to call a meeting of their respective towns to vote a second time for the choice of a register, and make their warrants returnable at the then next court of general sessions of the peace to be held in the same county, and so *toties quoties*, until some one person shall be elected by the majority voting.(2)

*Ibid.* s. 6.

IV. Of the power and duty of clerks of the common pleas, to act in the office of registers of deeds, during a vacancy.

By statute it is enacted, that upon a vacancy in the office of register of deeds in any county, the clerk of the court of common pleas of such county being first sworn before two justices of the peace, *quorum unus*, for the

*Ibid.* s. 4.

Clerk of the common pleas to take the records into his custody.

(2) By an additional act 1791, c. 12, it is enacted, that whenever it shall so happen, that no person shall have a majority of the votes legally returned for a register of deeds in any county within this commonwealth, in such cases the court of general sessions of the peace, are empowered to adjourn, for the purpose of opening the votes returned upon a new warrant, by the said court issued, to some day previous to the next court of general sessions of the peace, to be by law holden in the county: and at any adjournment for the purpose aforesaid, the same proceedings shall be had, as are now authorized by law at any court of general sessions of the peace, by law established for such county.

faithful discharge of the trust, shall take into his custody the several books wherein the deeds and conveyances of land are recorded, together with the deeds and other papers to the said office belonging.

*Ibid.*

Such clerk to receive deeds, etc.

His fees.

And the said clerk shall receive all deeds and other papers brought to be recorded during such vacancy, and he shall note thereon the time of their being received, and the record shall bear date accordingly; for which he shall be allowed *sixpence*, for each deed or paper, and no more.

*Ibid.*

Such clerk empowered to give attested copies of deeds, etc.

And such clerk is also empowered, during such vacancy, to make out attested copies of any such deeds and other papers to him committed as aforesaid, which copies shall be valid to all intents and purposes, as though the same had been made out by any register chosen, qualified, sworn, and obliged as aforesaid, for which copies the said clerk shall be allowed the same fees as is or may be provided for registers in similar cases. And upon the appointment of a register as aforesaid, he shall deliver up the said books, deeds, and papers, into his hands.

#### V. Mode of choosing registers in case of a vacancy.

*Ibid.* s. 2.

Warrants to selectmen to call town meetings.

By statute it is enacted, that upon the death, resignation, or removal of any register of deeds, two or more justices of the peace, *quorum unus*, living in or near the shire town of the same county, shall issue their warrants directed to the selectmen of the several towns within the county, ordering them forthwith to convene the inhabitants of their respective towns, qualified as the constitution provides, to vote for representatives, and proceed to the choice of some meet person qualified as aforesaid, to fill up the vacancy.

*Ibid.*

Of the return of such warrants, and following proceedings.

And the said justices shall make their warrants returnable to themselves at a certain day, as soon as conveniently may be, ordering the selectmen to seal up and transmit a transcript of the record of the number of votes, and person or persons voted for in their respective towns,

together with the warrants ; and the above said justices shall at the same time, give out their notifications to the other justices of such county of their proceedings therein, notifying them to meet upon the day appointed for the return of the said warrants, at some certain place in the shire town.

And the major part of the justices of such county, who shall meet at the time and place assigned as aforesaid, shall open and compare the returns made as before directed, and the person having the majority of votes after being sworn, and giving bonds as aforesaid, shall be the register of deeds for such county, until the time appointed by the act for the election of registers of deeds throughout the commonwealth, unless sooner removed by the court of general sessions of the peace of the same county, for misconduct in the discharge of his duty.

1184.

How the election shall be decided.

#### VI. The mode of removing registers for misconduct.

By statute, when any register of deeds, upon the presentment of the grand jury, or information of the attorney-general, or the person acting for the government in the same office, shall, by confession, demurrer, verdict, or by neglecting to appear and answer, after reasonable notice, be found guilty of misconduct or misbehaviour in discharging the duties of his said office, or that by reason of infirmity of body or mind, he is incapable of discharging aright, in person, the duties thereof; the court of sessions shall enter up judgment thereon, (and from whence no appeal shall lie,) that the same register be removed and displaced from the said office ; and thereupon issue a writ to the sheriff of the same county, to take the books and papers to the said office belonging, and them deliver over to the clerk of the court of common pleas, to be by him carefully kept until a register shall be duly chosen and qualified, as the law directs.

Stat. 1780, c. 55, s. 5.

## TITLE CXXVII.

## REMAINDER AND REVERSION.

1. **O**f remainders, generally.
2. Of contingent remainders.
3. Of reversions.
4. Of merger.

## I. Of remainders, generally.

3 Bl. Com. 164.

An estate in remainder may be defined to be, an estate limited to take effect and be enjoyed after another estate is determined.

Ibid.

As if a man, seized in fee simple, granteth lands to A for twenty years, and after the determination of the said term, then to B and his heirs forever : here A is tenant for years, remainder to B in fee. In the first place an estate for years is created or carved out of the fee, and given to A, and the residue or remainder of it is given to B. But both these interests are, in fact, only one estate ; the present term of years, and the remainder afterwards, when added together, being equal only to one estate in fee. They are indeed different *parts*, but they constitute only one *whole* ; they are carved out of one and the same inheritance : they are both created, and may both subsist together ; the one in possession, the other in expectancy.

Ibid. 164, 165.

So if land be granted to A for twenty years, and after the determination of the said term to B for life ; and, after the determination of B's estate for life, it be limited to C and his heirs forever : this makes A tenant for years, with remainder to B for life, remainder over to C in fee. Now here the estate of inheritance undergoes a division

into three portions: there is first A's estate for years carved out of it; and after that B's estate for life; and then the whole that remains is limited to C and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance: and if there were an hundred remainders, it would still be the same thing; upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee simple: because a fee simple is the highest and largest estate, that a subject is capable of enjoying; and he that is tenant in fee hath in him the *whole* of the estate: a remainder therefore, which is only a portion, or residuary part of the estate, cannot be reserved after the whole is disposed of. A particular estate, with all its remainders expectant thereon, is only one fee simple; as 40*l.* is part of 100*l.* and 60*l.* is the remainder of it: wherefore, after a fee simple once vested, there can no more be a remainder limited thereon, than after the whole 100*l.* is appropriated, there can be any residue subsisting.

Thus much being premised, we shall be the better enabled to comprehend the rules that are laid down by law to be observed in the creation of remainders, and the reasons upon which those rules are founded. Ibid. 165.

1. And, first, there must necessarily be some particular estate, precedent to the estate in remainder. As, an estate for years to A, remainder to B for life; or, an estate for life to A, remainder to B in tail. This precedent estate is called the *particular estate*, as being only a small part, or *particula*, of the inheritance; the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason; that *remainder* is a relative expression, and implies that some part of the thing is previously disposed Ibid.

of: for, where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it be, will be an estate in possession.

*Ibid.* 106, 106.

An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder: it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the ancient law, to be executed either now or hereafter, as the contracting parties should agree: but an estate of freehold must be created to commence immediately. For it is an ancient rule of the common law, that an estate of freehold cannot be created to commence in *futuro*; but it ought to take effect presently, either in possession or remainder: because at common law no freehold in lands could pass without livery of seizin; which must operate either immediately, or not at all.

*Ibid.* 106.

It would therefore, be contradictory, if an estate which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to A for seven years, to commence from next Michaelmas, is good; yet a conveyance to B of lands, to hold to him and his heirs forever, from the end of three years next ensuing, is void. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law.

*Ibid.*

As, where one leases to A for three years, with remainder to B in fee, and makes livery of seizin to A; here by the livery the freehold is immediately created,

and vested in B, during the continuance of A's term of years. The whole estate passes at once from the grantor to the grantees, and the remainder man is seized in his remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter ; but it is to all intents and purposes an estate commencing *in praesenti*, though to be occupied and enjoyed *in futuro*.

As no remainder can be created, without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate, as will support a remainder over. For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance ; and a portion must first be taken out of it, in order to constitute a remainder. Besides, if it be a freehold remainder, livery of seizin must be given at the time of its creation ; and the entry of the grantor, to do this, determines the estate at will at the very instant in which it is made : or, if the remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract*, if the tenant for years be a party to it, yet it is void by way of *remainder* : for it is a separate independent contract, distinct from the precedent estate at will ; and every remainder must be part of one and the same estate, out of which the preceding particular estate is taken. And hence it is generally true, that if the particular estate is void in its creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also : as where the particular estate is an estate for the life of a person not *in esse* ; or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate ; in either of these cases the remainder over is void.

A second rule to be observed is this ; that the remainder must commence, or pass out of the grantor, at the time of the creation of the particular estate.

*Ibid.* 166, 167.

*Ibid.* 167.

Ibid.

As where there is an estate to A for life, with remainder to B in fee : here B's remainder in fee passes from the grantor at the same time the seizin is delivered to A of his life estate in possession. And it is this which induces the necessity at common law of livery of seizin being made on the particular estate, whenever a freehold remainder is created.

Ibid. 168.

A third rule respecting remainders is this ; that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines.

Ibid.

As, if A be tenant for life, remainder to B in tail ; here B's remainder is vested in him, at the creation of the particular estate to A for life : or, if A and B be tenants for their joint lives, remainder to the survivor in fee ; here, though during their joint lives, the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor : wherefore both these are good remainders.

Ibid.

But if an estate be limited to A for life, remainder to the eldest son of B in tail, and A dies before B hath any son ; here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination, of the particular estate : and, even supposing that B should afterwards have a son, he shall not take by this remainder ; for as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone forever. And this depends upon the principle before laid down, that the precedent particular estate, and the remainder, are one estate in law ; they must, therefore, subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate, and the remainder supported thereby. The thing supported must fall to the ground, if once its support be severed from it.

II. Of contingent remainders.

Remainders are either *vested* or *contingent*. *Vested* remainders (or remainders *executed*, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the particular estate is spent. 2 Bl. Com. 168.

As if A be tenant for twenty years, remainder to B in fee; here B's is a vested remainder, which nothing can defeat, or set aside. Ibid. 169.

Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect. Ibid.

First, they may be limited to a dubious and uncertain *person*. As if A be tenant for life, with remainder to B's eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B will have a son or no: but the instant that a son is born, the remainder is no longer contingent, but vested. Though, if A had died before the contingency happened, that is, before B's son was born, the remainder would have been absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A were tenant for life, remainder to his eldest son in tail, and A died without issue born, but leaving his wife big with child, and after his death a posthumous son was born, this son could not take the land by virtue of the remainder; for the particular estate determined before there was any person *in esse*, in whom the remainder could vest. But to remedy this hardship, it is enacted, by statute 10 and 11, W. III. c. 16, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's Ibid.

life-time : that is, the remainder is allowed to vest in them, while yet in their mother's womb.

*Ibid.* 169, 170.

This species of contingent remainders, to a person not in being, must, however, be limited to some one, that may by common possibility, be *in esse* at or before the particular estate determines. As if an estate be made to A for life, remainder to the heirs of B : now, if A dies before B, the remainder is at an end, for during B's life he has no heir, *nemo est hæres viventis* : but if B dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B's dying before A is *potentia propinqua*, and therefore allowed in law.

*Ibid.* 170.

But a remainder to the right heirs of B (if there be no such person as B *in esse*) is void. For here there must two contingencies happen ; first, that such a person as B shall be born ; and, secondly, that he shall also die during the continuance of the particular estate ; which make it a most improbable possibility.

*Ibid.*

A remainder to a man's eldest son, who hath none, is good ; for by common possibility he may have one ; but if it be limited in particular to his son John or Richard, it is bad, if he have no son of that name ; for it is too remote a possibility that he should not only have a son, but a son of a particular name. A limitation of a remainder to a bastard before it is born, is not good : for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. Thus may a remainder be contingent, on account of the uncertainty of the *person* who is to take it.

*Ibid.*

A remainder may also be contingent, where the person to whom it is limited, is fixed and certain, but the *event* upon which it is to take effect, is vague and uncertain.

*Ibid.*

As, where land is given to A for life, and in case B survives him, then with remainder to B in fee : here B

is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A and B it is contingent; and if B dies first, it never can vest in his heirs, but is forever gone; but if A dies first, the remainder to B becomes vested.

Contingent remainders of either kind, if they amount to a freehold, cannot be limited on an estate for years, or any other particular estate less than a freehold. Thus, if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is void: but if granted to A for life, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him, without vesting somewhere; and in case of a contingent remainder, it must vest in the particular tenant, else it can vest nowhere: unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void. Ibid. 176.

Contingent remainders may be *defeated*, by destroying or determining the particular estate upon which they depend, before the contingency happens, whereby they become vested. Ibid.

Therefore, when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender or other methods, destroy and determine his own life estate, before any of those remainders vest; the consequence of which is, that he utterly defeats them all. Ibid.

As if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life estate, he, by that means, defeats the remainder in tail to his son: for his son not being *in esse*, when the particular estate determined, the remainder could not then vest; and as it could not vest then, by the rules before laid down, it never can Ibid. 171, 172.

vest at all. In these cases, therefore, it is necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If, therefore, his estate for life determines otherwise than by his death, the estate of the trustees, for the residue of his natural life, will then take effect, and become a particular estate in possession, sufficient to support the remainders depending in contingency.

### III. Of reversions.

1 Bl. Com. 175.

An estate in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him.

*Ibid.*

As, if there be a gift in tail, the reversion of the fee is, without any special reversion, vested in the donor by act of law: and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee simple of all lands must abide somewhere; and if he who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never, therefore, created by deed or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferable, when actually vested, being both estates *in præsenti*, though taking effect *in futuro*.

*Ibid.*, 176.

The usual incident to a reversion is rent. The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent; by *special* words: but by a *general* grant of the reversion, the rent will pass with it as incident thereunto; though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *e converso*: for the maxim of law is, "*accessorium non ducit, sed sequitur suum principale.*"

## IV. Of merger.

Whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be *merged*, that is, sunk or drowned in the greater. Thus, if there be tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person, in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en autre droit*) there is no merger. Ibid. 177.

Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. Ibid.

So also, if he who hath the reversion in fee, marries the tenant for years, there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife. Ibid.

TITLE CXXVIII.

REPLEVIN.

**R**EPLEVIN is a process, grounded on a supposed unlawful taking of the personal property of another, by which the officer is directed to re-deliver the property to the plaintiff, on security given by him, to prosecute his action, and comply with the judgment of court thereupon.

1. In what cases replevin will lie ; and the proceedings by which it is made.
2. Of replevin, in reference to the person.
3. The pleadings in replevin.
4. Proceedings in replevin, before a justice of the peace.
5. Of the judgment, damages, and costs, where replevin is brought, originally, before a justice of the peace.
6. Of the judgment, damages, and costs, where replevin is brought, originally, at the common pleas.
7. Of the writ of restitution, and the writ of withernam.
8. Replevin bonds.

I. In what cases replevin will lie ; and the proceedings by which it is made.

When any person shall have his cattle distrained or impounded, in order to obtain satisfaction for damages they may have committed; or to obtain a forfeiture, supposed to have been incurred, for their going at large, out of the enclosure of the owner, in violation of law ; in order to have the legality of such distraint or impounding determined ; he may prosecute a writ of replevin, for the liberation of the cattle, thus impounded. In such

Stat. 1789, c. 35, s. 1.

Id.

case, the action must be brought before a justice of the peace.

The form of the writ is prescribed by statute, and may be seen in the appendix.

See Appendix, No. 8.

So also when any goods or chattels, shall be taken, distrained or attached, which shall be claimed by a *third* person; and the person, thus claiming the same, shall think proper to replevy them; in case such goods and chattels are of the value of more than *four pounds*, he may take out and prosecute his writ of replevin, from the clerk's office of the court of common pleas, in the county where the goods and chattels are thus taken, distrained or attached. The form of this writ is, likewise, prescribed by statute. (1).

Ibid. s. 4.

Replevin will not lie for one, whose goods and chattels are attached as his *own* property, on mesne process, warrant of distress, or on execution. (2)

Ibid.

(1) *Query*, if the damages must not now exceed *twenty dollars* instead of *thirteen dollars and thirty-three cents*, in order to give jurisdiction of the case to the common pleas: for by a late statute, the jurisdiction of justices of the peace is extended to all civil actions where the debt or damage does not exceed *twenty dollars*.

A writ of replevin must be indorsed.

Gould v. Barnard, 3 Mass. Rep. 199.

If the defendant pleads the want of an indorser in abatement of the writ, without any suggestion entitling him to the possession of the goods, and the writ is abated, he shall have judgment for his costs, but not for a return.

Ibid.

(2) Chattels, in the custody of the law, cannot be replevied at the common law; but by the statute of 1789, c. 26, replevin lies against an officer for chattels attached or seized in execution by him, provided the debtor is not the plaintiff in replevin.

Isley and al. v. Stubbs, 5 Mass. Rep. 281.

Where the messenger of the commissioners of a bankrupt had delivered goods of the bankrupt to a stranger, taking his obligation to keep them safely, and to redeliver them on demand, it was held that the bailee could not maintain replevin against one who had taken them; *property*, either general or special, being required to be shewn in replevin, though *possession* is sufficient to maintain trover.

Waterman v. Robinson, 5 Mass. Rep. 503.

2 Esp. Dig. 46.

In general, replevin will not lie without a property in the goods taken, either *absolute* or *special*; and therefore, animals *feræ nature*, unless reclaimed, cannot be replevied.

Stat. 1789, c. 26.

Before the officer serves a writ of replevin, he must take a bond from the plaintiff, in a sum amounting to double the value of the property to be replevied, with condition, that the plaintiff prosecute his action to final judgment; and pay such damages and costs, as the defendant shall recover against him; and also, that he return and restore the property replevied, in case such shall be the final judgment.(3)

Ibid. s. 5.

When the defendant in replevin cannot be found, an authentic copy of the writ, attested by the officer, being left at his house, or place of usual abode, seven days, if before a justice, and fourteen, if before the common pleas, prior to the time of trial, shall be sufficient to oblige the defendant to answer to the suit.

## II. Of replevin, in reference to the person.

2 Esp. Dig. 48.

If the goods of several persons are taken, they cannot join in replevin; but each must have a several action. For if the caption be unjust, each has received a separate injury, for which he ought singly to complain; but if they joined, each would be complaining of the injury done to the other, which would be absurd.

2 Esp. Dig. 48.

Joint-tenants however may, or rather *must*, join in this action; for they are jointly interested in the property.

2 Mas. T. R. 509.

So also, must tenants in common join in this action; and if from the declaration, it appear that the plaintiff is

(3) If goods are attached upon an original writ, and replevied out of the hands of the sheriff by the coroner; the *creditor*, in the original suit, cannot maintain an action against the coroner for taking insufficient pledges, upon the replevin, or for other misfeasances in the service of it: such action lies for the sheriff only, who had a *special* property in the goods; the *general* property being in abeyance.

Ladd v. North. 2 Mass. Rep. 514.

but part owner of the property replevied, the court will, *ex-officio*, abate the writ.

If the cattle of a *feme sole* be taken, and she afterwards intermarries; the *husband, alone*, may have replevin; for by the marriage, all the personal property of the wife becomes absolutely his. But if the wife joins in replevin, after a verdict, judgment will not be arrested; for the court will presume them to be jointly interested; the avowry admitting the property to be in the manner it is laid.

<sup>2</sup> Esp. Dig. 48.  
<sup>1</sup> Bull. N. P. 55.

Executors may maintain replevin for the goods of the testator, though taken in his life-time; for as the testator's property is transferred to the executor, the right must be also transferred, of recovering possession of it.

<sup>2</sup> Esp. Dig. 49.  
<sup>1</sup> Sid. 81.

If A takes my goods, by command of B, I may have replevin against both; for, it being a trespass, both are principals.

<sup>2</sup> Esp. Dig. 49.

### III. The pleadings in replevin.

#### 1. The declaration.

The declaration should be certain in setting out the number, and kind of cattle or goods distrained. For otherwise, the sheriff would not know how to make deliverance, if it should be necessary. Though this fault might be cured by the avowry, both parties agreeing on the number and nature of the things taken.

<sup>2</sup> Esp. Dig. 3.  
Sule 71.

Where cattle impounded *damage feasant*, are replevied, (in which case the suit must originate before a justice of the peace) it is not sufficient for the plaintiff to state in his declaration, the taking in such a vill, or place, generally, for a venue, but he must particularly set it out, as "*a certain place called, &c.*" For by alleging the vill, generally, perhaps defendant might have a right of freehold there himself, but by mentioning the particular place, in the count, it shews defendant, to what to make title. But this should be taken advantage of by *special* demurrer. For if defendant does not demur, but pleads *non cepit*, the count shall stand; for if there was no taking, the place is immaterial.

<sup>2</sup> Esp. Dig. 2.

Ward v. Laville,  
Cro. Eliz. 896.

2 Esp. Dig. 9.  
1 Stra. 507.

But where the defendant so pleads *non cepit*, the plaintiff must prove the taking, at the place mentioned in the declaration. For as the defendant, on this issue, does not insist upon a return, but denies the taking, the place is material to ascertain the fact as laid.

2 Esp. Dig. 9.  
Bull. N. P. 54.

The plaintiff may declare for several takings, and at several places, part at one time or place, and part at another: and if the plaintiff alleges two places, and the defendant answers only to one; that is, if the plea begins as an answer to the whole, which in fact is but an answer to a part; it is a discontinuance, and the plaintiff must not demur, but take his judgment for *that*, by *nihil dicit*; for if he demurs, or pleads over, the whole action is discontinued.

## 2. Pleas in abatement.

3 Esp. Dig. 9.

These are either such as, of *themselves*, induce a return; or such as require a *conusance*, or *claim*.

Ibid.  
2 Lev. 92.

As first, if defendant pleads, "*that the goods are the property of himself, or of a stranger*;" this plea neither denies, confesses, nor avoids, the caption, but shews that plaintiff, not having any property in the goods, has no right to have them delivered to him; that therefore the writ should be quashed, and he, (defendant) have a return of the goods.

2 Esp. Dig. 10.  
Salk. 94.

Therefore, in pleading such matter, defendant need make no claim or suggestion, to entitle him to a return; because he had possession of the goods, before the replevin, of which he was deprived by plaintiff, who had no right.

2 Esp. Dig. 10.  
Co. Litt. 145.

As to the second case; if defendant pleads, "*that the goods were the property of the plaintiff, and another person*," as this plea goes only to the form of the writ, (the plaintiff alone not having the property,) defendant must add a *conusance* or *claim*, to entitle him to a return. (4)

(4) A part owner of a chattel cannot maintain replevin for his undivided part; and if it appear from the plaintiff's own shewing, that he is but part owner, the court will abate the writ, *ex officio*.

2 Mass. Rep. 509.

So if the plaintiff declares of a taking *in one place*, and defendant pleads, that he took the goods *at another*; in this case, he must make consuance, or avow, for a return; for such plea does not disaffirm property in the plaintiff; and defendant must shew a right, either of possession or property, to have a return.

2 Esp. Dig. 10.  
Foots' case,  
Salk. 93.

And in such case, the plaintiff ought not to traverse the matter of the consuance; if he does, and demurrer be joined on it, it is a discontinuance, and defendant shall have judgment on it. He should only reply to the place traversed, for to reply to the consuance, would be to plead double.

2 Esp. Dig. 10.

### 3. The general issue; or non cepit.

This plea confines the issue to the taking; for it allows the property to be in the plaintiff. And therefore *that* being admitted by the plea, no evidence shall be admitted to disprove it.

Ibid. 11.

If defendant pleads *non cepit*, it confines the taking to the *place mentioned in the declaration*; so that defendant may prove the taking to be at a place, *different from that laid in the declaration*, and it shall be good.

Ibid. 12.

This is, provided the defendant never had the cattle in the place, mentioned in the declaration, at all; for if plaintiff can prove, that defendant had them in the place laid, he will have a verdict; though if the fact is, that defendant took the cattle at *another place*, and only had them in the place, mentioned in the declaration, *in the way to the pound*; he ought to shew that matter, specially.

2 Esp. Dig. 12.  
Bull. N. P. 54.

### 4. The statute of limitation.

By statute it is enacted, that actions of replevin must be brought within six years, next after the cause of such actions, and not after. This statute therefore is a good plea in bar.

Stat. 1786, c. 57, s. 1.

### 5. Justification.

A plea in justification admits the caption, but denies the injustice of it.

2 Esp. Dig. 12.

Ibid.

2 Lev. 98.

As is the plea, claiming property either in defendant himself, or in a stranger ; which it was shewn, might be pleaded in abatement : but it may also be pleaded in bar, as it destroys all right of action in the plaintiff : for if the property be in defendant himself, it is clear ; and if it be in a stranger, defendant is entitled to hold the goods against all persons but the stranger himself, and therefore has a right to a return.

2 Esp. Dig. 13.

Therefore, where defendant pleaded that, at the time of the taking, the property was in Lord *North*, not in the plaintiff, he was held to be entitled to a return.

Ibid.

A distinction is to be observed between an avowry, and a justification. An avowry always goes for a return, and therefore shews a subsisting right at the time of the avowry ; but a plea in justification does not always go for a return. As for example, where the *original taking* was lawful, but the *detention* is not so at the time of the plea pleaded.

1 Mas. T. R. 183.

Matter in justification must be specially pleaded, and cannot be given in evidence, under the general issue, even by agreement of parties.

#### 6. The avowry, cognizance, and replication.

2 Esp. Dig. 13.

An avowry is an acknowledgment by the defendant, of the taking of the beasts, or goods ; and sets forth the cause of taking them, for the purpose of having a return.

Ibid. 14.

If the defendant was not acting in his own right, but as bailiff to another, he is not said to *avow*, but to make *cognizance*.

Ibid. 46.

Shk. 107.

If defendant makes consuance, as bailiff to J S, plaintiff may traverse the fact, that he was bailiff ; for though J S may have a title, yet a stranger, who had no authority from him, could have no title, and would be liable ; so that both parts of defendant's plea must be true ; and therefore an answer to any part is sufficient.

Stat. 1788, c. 65, s. 3.

By statute it is enacted, that any person, injured in his tillage, mowing, or other lands under improvement, that are enclosed with a legal and sufficient fence, whether

such improved lands be in a common or general field, or in a close by itself, by swine, sheep, horses, or neat cattle, may have and maintain an action of *quare clausum fregit* against the owner of the cattle, for his damages; or he may impound the creatures, doing the damage, or some of them, at his election, with, or without the aid of a field driver.

If therefore the defendant avows the taking of the cattle, *damage feasant*, the plaintiff, in his replication, may avoid the avowry, by setting forth, *that the defendant's fence was insufficient*.

It is also provided by statute 1788, c. 65, that when an action of trespass shall be brought against the owner of any creatures mentioned in said act, for damages by them done, upon his enclosed lands under improvement; or when such creatures, taken damage feasant, and impounded, shall be replevied; it shall be in the power of the justice, or court, before whom the cause shall be determined, to render judgment in favour of the person demanding damages, for the injury sustained, upon satisfactory evidence being produced, that such creatures were either clandestinely turned in, or broke into the close, in a part, where the fence was good and sufficient, according to law; other parts of the fence, round the same close being deficient notwithstanding. Sec. 5.

An exactly similar provision is made by statute 1785, c. 53, s. 11, entitled "*An act, concerning general and common fields*."

If therefore the plaintiff replies, that defendant's fence was insufficient, the defendant may rejoin, either 1st. *that the creatures were clandestinely turned in*; or 2d, *that they broke into the close, in a part where the fence was sufficient*.

IV. Proceedings in replevin, before a justice of the peace.

It is enacted, that when it shall appear, from the plea or avowry of the defendant in replevin, that the sum de- Stat. 1789, c. 24, s. 3.

manded in damages, for the taking and detaining, exceeds *eighty shillings*, or that the property of the beast taken, is the question between the parties (in case the value of the beasts exceed *eighty shillings*;) or that the right to soil and freehold is coming in question, in every such case the justice shall not proceed to try the issue.

Ed. Hist. L. T. 302.

It is however here noticeable, that in the case of impounding cattle, *damage feasant*, the *plea* of avowry cannot offer an issue, to bring the title of the land in question; against the plaintiff: it must only state the cause of the taking, and impounding. The plaintiff, in his *replication*, may tender an issue, as to the close, where the cattle are said to have been taken; and the justice can proceed no further.

Stat. 1789, c. 26, s. 3.

When the issue is of such a nature as to exceed the jurisdiction of the justice, he must order the defendant in replevin to recognize, in a reasonable sum, with sufficient surety or sureties, to the adverse party, to enter the said action at the next court of common pleas, or the supreme judicial court, to be held in the same county, as the plaintiff in replevin shall elect; and to prosecute the same to effect.

Ed.

If the defendant neglect thus to recognize, the justice shall render judgment against him, in the same manner as if he refused to answer to the suit. And, in case the defendant shall, after recognizing, fail of entering or prosecuting the action, the plaintiff may enter and prosecute the action, or have his remedy on the recognizance, at his election.

V. Of the judgment, damages, and costs, where replevin is brought, originally, before a justice of the peace.

Ibid. s. 2.

In replevin brought, originally, before a justice of the peace, when it shall appear, from the plea of the defendant, that the cattle were taken and impounded, damage feasant, or for the recovery of a penalty, incurred for their being found going at large, out of the inclosure of the

owner, in violation of law ; and, upon the issue, it shall be determined, that the cause of taking and detaining was lawful, and justifiable ; judgment shall, instead of a return of the cattle, be rendered for the defendant in replevin, to recover such reasonable damages, as, upon a consideration of the circumstances of the case, the justice (or a jury, in case it comes before one,) shall assess, together with costs of taking and impounding, and costs of defence.

But if, upon the trial of the issue, it shall appear, <sup>Ibid.</sup> that the cattle were taken or detained, without sufficient and justifiable cause, the plaintiff in replevin shall recover such reasonable damages, for the taking and detaining, as the justice, (or a jury, in case it comes before one,) shall assess, together with his costs.

But when, from the matter of the plea of the defendant in replevin, damages with propriety cannot be assessed, or that a restoration of the property replevied, is the best recompense the party can have ; and, upon the issue, it shall be found, that the cattle were taken and detained lawfully, and for justifiable cause ; the judgment shall be rendered, that the cattle be returned and restored to the defendant, irrepleviable, and for costs ; and he be entitled to writ of return and restitution accordingly.

VI. Of the judgment, damages, and costs, where replevin is brought, originally, at the common pleas.

Where replevin is brought, originally, at the common <sup>Ibid. s. 4.</sup> pleas, in case the plaintiff shall neglect to enter and prosecute his suit, the defendant may, upon complaint, have judgment for a return and restoration of the goods and chattels replevied, and the damages for the taking, to the amount of six per cent. on the bond, with reasonable costs, and a writ of return and restitution thereupon, accordingly.

And if, upon a trial of the issue, judgment shall be rendered for a return and restitution, the interest of six per <sup>Ibid.</sup>

cent. upon the penal sum of the bond, shall be taken as a rule for estimating the damages, in case they were taken by execution. (5)

1 Mas. T. R. 481.

In the case of *Pike v. Huckins*, which was replevin, the goods had been attached on *mesne process*, by the defendant, who was an officer; and the plaintiff was non-suited. The question in this case, therefore, related merely to the quantum of damages. For the defendant, it was said, that he ought to recover six per cent. on the penal sum of the bond. For the plaintiff, it was insisted, that in cases of taking on *mesne process*, the damages were to be ascertained by an inquiry into the particular circumstances of each case. But the court held, that the rule, under the statute, was uniform for estimating the damages; that they were *in all cases* to be six per cent. on the penal sum of the bond; and that the damage to the real owner of the goods was precisely the same in cases of *attachment*, as in those of taking, on *execution*. (6)

Stat. 1789, c. 26, s. 4.

When the cause of taking shall have been upon execution, the goods and chattels returned, shall be responsible for the space of twenty days after the return; and if on *mesne process*, until thirty days shall have expired, after final judgment thereon; in case judgment shall not then have been given; but if final judgment on the *mesne process* shall have been given, before the return, then for the space of twenty days only, after the

(5) The statute of replevins, 1789, c. 26, has prescribed six per cent. on the replevin bond as the measure of the defendant's damages, when the plaintiff shall fail to prosecute his suit; and when goods taken in execution are unlawfully replevied: in all other cases, his damages are left to be assessed according to the magnitude of the injury. *Bruce v. Learned*, 4 Mass. Rep. 614.

(6) In replevin, a verdict being found for the defendant, and damages assessed, if the plaintiff reviews the action, and obtains a reduction of the defendant's damages; the defendant shall notwithstanding recover his costs.

*Bruce v. Learned*, 4 Mass. Rep. 614.

return; to the end, the creditor, at whose suit they were originally taken, may have a complete remedy, and the benefit of his attachment.

The moneys recovered by way of damages, by any officer, who has taken or attached, at the suit of a creditor, shall be considered and taken as recovered to the use of the creditor; and when received, be paid over to him accordingly. <sup>Ibid.</sup>

VII. Of the writ of restitution, and the writ of withernam.

The form of the writ of return and restitution, to be issued from a justice of the peace, is prescribed by statute, and may be seen in the appendix. This writ recites the judgment, and then commands the officer, forthwith to return the beasts to the owner; that is, to the defendant in replevin. <sup>Ibid. s. 6.</sup>  
<sup>See Append. No. 6.</sup>

When the sheriff or other officer, unto whom the writ of return and restitution shall be directed, shall not be able to find the beasts or other property, in his precinct, which shall, by the same precept, be directed to be returned and restored irrepleviable, and the same shall appear in writing, by the return of the officer thereon, the court from whence the same issued, may, upon motion, grant a withernam against the plaintiff in replevin, to compel a complete and specific performance of the judgment. <sup>Ibid. s. 7.</sup>

The form of the writ of *withernam*, to be issued from a justice of the peace, is also prescribed by statute, and may be seen in the appendix. This writ recites *the judgment*, and also *the writ of return*, together with *the doings of the officer thereon*; after which, it commands the officer to take the beasts of the plaintiff in replevin, of like kind and value, (if any he hath) in *withernam*, and in default thereof, *any other of his goods and chattels*, to the full value, in *withernam*, and them deliver to the defendant in replevin, to be by him kept, used, and improved, until the <sup>Ibid.</sup>  
<sup>See Append. No. 3.</sup>

plaintiff shall restore him the beasts he took from him, by virtue of the writ of replevin.

*Ibid.* 1. 2.

The statute has also provided, that when the writ of return and restoration, or writ of withernam, shall issue from any other court of law, or for any other property than beasts, the court from whence the same shall issue, shall so vary the form, as to them shall appear expedient to carry the same into full force and effect, as the nature and circumstances of the case shall require.

#### VIII. Replevin bonds.

*Sevey v. Blacklin  
and al.  
2 Mass. Rep. 541.*

1. It is no good bar to an action of debt upon a replevin bond, that the plaintiff recovered judgment for a return of his goods, and for his damages and costs; and that the defendant delivered part of the goods, and tendered the remainder, which were not received; and as to the damages and costs, *cognoscit actionem*.

*Ibid.*

2. Neither is it a good plea in such action, that the defendant has always been ready to return the goods, and pay the damages and costs; but the plaintiff never demanded them, nor delivered his writ of *retorno habendo* to an officer, to be executed.

*Lindsay v. Blood,  
3 Mass. Rep. 518.*

3. To an action of debt on a replevin bond, the condition of which was, that the plaintiff in replevin should prosecute his writ to final judgment, pay such damages and costs as should be adjudged against him, and return the cattle; and the defendant pleaded "*that there had been no final judgment, that he should return the cattle, or that he should pay damages or costs;*" the plea was adjudged bad.

*Flegg v. Tyler,  
3 Mass. Rep. 303.*

4. In this case, which was debt on replevin bond, against the surety, the defendant pleaded "*that the goods replevied were the proper goods of the plaintiff in replevin, and were attached and held as such by the defendant in replevin, who was a deputy sheriff, upon meane process against the plaintiff in replevin;*" the plea was adjudged bad.

5. Where goods attached by the sheriff on four writs were replevied from his possession by as many writs of replevin, sued by the same party, on each of which a bond was given to the sheriff, and he put them all in suit, he had costs in each action.

Morse v. Hodsdon,  
and al.  
5 Mass. Rep. 314.

6. If the officer to whom a writ of replevin is directed and delivered, take from the plaintiff a bond not conformed to the requisition of the statute, which is voluntarily executed by the plaintiff, he shall not avoid it, on that account.

Ibid.

TITLE CXXIX.

RESCUE.

1. **W**HAT is a rescue.
2. Of rescuing creatures from the custody of a field-driver, or other person, driving them to pound.
3. Of rescue from the pound; or pound-breach.(1)

I. What is a rescue.

Rescue is the unlawful taking away and setting at liberty, any beast in the custody of a person lawfully driving the same to pound; or in unlawfully taking away such beast after the same is impounded; in which latter case it is usually called pound-breach. But the more general notion of rescue is the forcibly freeing another from an arrest, or some legal commitment.

4 Bac. Abr. 396.

Field.

If a man distrain cattle, and as he is driving them to the pound, they go into the owner's house, and he refuse to deliver them, this a rescue in law.

II. Of rescuing creatures from the custody of a field-driver, or other person, driving them to pound.

Stat. 1788, c. 65, s. 6.

By statute it is enacted, that if any person shall rescue any creatures taken up, (as authorized by the statute,) out of the hands or care of the *field-driver*,(2) or from

(1) For further information relative to *RESCUE*, see title *ESCAPE*, p. 493. 498.

(2) The penalty given by statute 1788, c. 65, s. 6, does not extend to the rescue of *neat* cattle from a *field-driver*, which are taken up *for going at large*, contrary to law. But it is confined to the rescue of *horses*, *swine*, or *sheep*, if taken up *for going at large*; or if *neat* cattle, to such neat cattle as are taken *damage feasant*. For

the hands of any other person being about to drive or convey them to pound, whereby the party injured may be in danger of losing such his remedy, and the law evaded; the person thus offending, shall for such rescue, forfeit and pay the sum of *forty shillings*, to be recovered by action of debt, one half part to him or them that will sue for the same, and the other half part to and for the use of the county within which the offence is committed; (3) and be further liable to pay the party injured,

the statute of 1788, c. 65, does not prohibit *neat* cattle from *going at large*, and the power to impound such, by a town vote, was given by statute 1799, c. 61. Besides, penal statutes must be construed strictly, and ought not to be extended by implication, beyond the import of the words.

See *Berry v. Ripley*, 1 Mass. Rep. 167.

(3) In *Melody v. Reab*, 4 Mass. Rep. 471, (which was a writ of error, brought to reverse a judgment rendered in a *qui tam* action, grounded on stat. 1788, c. 65, s. 6.) Parsons, C. J. in delivering the opinion of the court said, that "in an action of rescue of cattle distrained, the defendant may, at common law, defend himself by shewing that the distress was without legal cause; because, in that case, the plaintiff has the cattle unlawfully in his custody at the time of the rescue. For the same reason, if the distrainer should waive his writ of rescue, and sue an action of the case to recover his damages, the defendant may shew the distress to be unlawful; for the plaintiff would have suffered no injury by the rescue.

"If the statute of 1788, c. 65, had created a forfeiture for a rescue, and had given an action of debt to recover it, *without making any further provision*, the defendant might, without doubt, have pleaded in bar of the action, '*that the distress was unlawful*.' For if the plea had been true, he might legally retake his cattle from the custody of a trespasser.

"But by the sixth section of that statute, a forfeiture of *forty shillings* is created for a rescue, to be recovered in an action of debt *qui tam*. A forfeiture of *five pounds* is also created for a pound-breach to be recovered in the same manner. And in the case of rescue the party injured may recover his damages by action of the case; and in case of pound-breach he may recover double damages, by the same form of action. But it is provided that, in this last action, as well as in an action to recover damages for a rescue, the

the full damages he might be entitled to recover by impounding such creatures in an action of the case: in which action the defendant shall not give in evidence any matter to prove the taking illegal.

### III. Of rescue from the pound; or pound-breach.

*Ibid.*

Penalty for pound-breach.

The same statute has further enacted, that if any person shall make any pound-breach, or by any indirect way or manner whatever, convey or deliver any of the creatures (mentioned in the act) impounded, from the pound or places where they may be restrained,(4) the person thus offending, shall forfeit and pay the sum of *five pounds*, to be recovered by action of debt, one half to him that will sue for the same, and the other half for the use of the county within which the offence may be committed; or by presentment of the grand jury, in which case, the whole penalty shall inure to the use of the county.

defendant shall not be allowed to give in evidence *the illegality of the distress*, to prevent the plaintiff from recovering his full damages. This provision the plaintiff in error would, by an *equitable construction* of the statute, extend to the popular action of debt *qui tam* to recover the forfeiture incurred by a rescue.

"This, it is our opinion, cannot be done. Penal statutes must be construed strictly, according to the intention of the legislature, as discovered by the import of the words; and, when not remedial, are not to be extended by equitable principles. Further:—Statutes are not to be construed as taking away a common law right, unless the intention is manifest. Without this provision of the statute, the defendant may plead in this action, *that the distress was unlawful*; and this defence, neither the express words, nor any reasonable construction of them has taken away.

"This provision, when applied to an action of pound-breach, is in affirmance of the common law; and probably in a popular action to recover the forfeiture created by this statute, for a pound-breach, the same rule would be applied at law without the aid of the statute. But by the express words of the statute, this defence is prohibited only in actions of the case to recover damages, either for a rescue or a pound-breach.

(4) The statute does not prohibit neat cattle *going at large*, or make them liable to be impounded, for *that cause*.

And the court before whom the conviction shall be, may at the time of declaring the sentence, further order, in default of payment of the said sum of *five pounds*, with costs of prosecution, within fourteen days after sentence, the person convicted to be publicly whipped not exceeding twenty stripes, or be confined to hard labour for a term not exceeding six months.

*Ibid.*

Proceedings in default of payment of the penalty and costs.

And the person offending as aforesaid, shall be liable to pay the party injured, double the damages he may be entitled to recover, by the impounding such creatures, in an action of the case.

*Ibid.*

Double damages to the injured party.

And the party injured by a pound-breach, when it is effected by an apprentice or minor, may prosecute for his damages, the parent or master, under whose care such apprentice or minor may then be, or the apprentice or minor, at his election.

*Ibid.*

Parents and masters liable for minors and apprentices.

In which action, as well as for damages occasioned by the rescue of cattle about to be impounded, the defendant shall not be permitted to give in evidence the insufficiency of the fence, (if any such there be,) or that the creatures, when taken, were under such circumstances as to render the impounding illegal, to prevent the party from recovering his full damages.(5)

*Ibid.*

Defendant not allowed to give in evidence the insufficiency of the fence, or legality of the distress.

(5) See note (4.)

TITLE CXXX.

REVIEW.

1. **O**f review *by right*, where the party has had only one verdict against him.

2. Of review *by petition*, grounded on the equity of the party's case.

3. Of review in *real* actions, after the death of one or both of the original parties.

4. Of review in *personal* actions, after the death of one or both of the original parties.

5. Proceedings when either of the parties die, pending a writ of review.

6. Of the trial, pleadings, evidence, reversal of judgment, and damages in writs of review.

7. Of the reversal of judgment and costs, where there were several original defendants, against whom *joint* damages were recovered, and one, only, brings review.

8. Of the reversal of judgment and costs, where there were more than one original defendant, against whom *several* damages were recovered, and one, only, brings review.

9. Proceedings by which original defendants, being plaintiffs in review, may obtain stay of execution.

10. How writs of review may be served.

I. Of review *by right*, where the party has had only one verdict against him.

Stat. 1786, c. 66, s. 1.

By statute, either party aggrieved at the judgment of the supreme judicial court, where only one verdict hath been given against him in the action, may, at any time

within two years, review the same cause and have one trial more.

Any infant, feme covert, or person non compos mentis, imprisoned, in captivity, or out of the United States of America, may review their actions at any time within two years, exclusive of the time such impediment exists. <sup>Ibid.</sup>

II. Of review *by petition*, grounded on the equity of the party's case.

We have two acts on this subject. The first is, stat. 1788, c. 11, entitled "*An act empowering the justices of the supreme judicial court to grant writs of review in certain cases.*" The second is, stat. 1791, c. 17, and is an act in addition to the first. I shall now proceed to notice both these acts particularly, beginning with the first.

1. The stat. 1788. c. 11.

Stat. 1788, c. 11.

The preamble recites, that "the justices of the supreme judicial court are, by law, empowered in certain cases to set aside verdicts and grant new trials; but are not empowered by law, to set aside judgments, when rendered on such verdicts. And as the said justices have no power to set aside such judgments, many inconveniences have happened and may thereafter happen, unless some remedy be provided." <sup>Ibid.</sup>

Preamble.

The statute then proceeds to make the following provisions :

1. That wherever there hath been, or thereafter may be, any legal cause for the said justices, before judgment, to set aside any verdict, but nevertheless judgment hath been, or thereafter may be rendered on such verdict, the party aggrieved by such judgment, (and not otherwise entitled to a review of the cause,) may petition the justices of the aforesaid court, at any of their terms, for a review of such cause. And the said justices, on due notice to the adverse party, and full consideration of such petition, are empowered, (if they see fit,) to grant a review of the said cause, on such terms and conditions, <sup>Ibid. s. 1.</sup>

S. J. C. empowered to grant reviews, on application.

Notice to the adverse party.

On what conditions a review may be granted.

as to them may seem just and reasonable between the parties.

*Ibid.* s. 2.

For what causes a review may be granted.

2. Whenever by reason of any accident, mistake, or any unforeseen cause, judgment hath been, or thereafter may be rendered, on discontinuance, non suit, *nil dicit*, *non sum informatus*, report of referees, or default; or suits have been, or thereafter may be discontinued without judgment, to the hindrance or subversion of justice, the said justices, on petition as aforesaid, are further empowered to grant a review of the action in manner as aforesaid.

*Ibid.* s. 3.

Where the cause of review happens in the common pleas, or before a justice of the peace.

3. And whereas similar cases do happen, in the courts of common pleas, and before justices of the peace, therefore wherever, by reason of any of the causes mentioned in the last enacting clause, any judgment in the said court of common pleas, or before any justice of the peace, hath been, or may thereafter be rendered in manner as in the same clause is mentioned, or any appeal hath been, or thereafter may be lost or prevented to the hindrance or subversion of justice as aforesaid; and the party aggrieved shall produce in and file with the clerk of the supreme judicial court, a copy of record of the cause duly attested, and shall petition the justices of the same court, for a review of the cause in manner as aforesaid; the said justices may grant a review of the said cause, in manner aforesaid, to be heard and determined in the said supreme judicial court.

Copy of the case to be produced.

Petition.

Within what time such petition must be presented.

But one review to be granted of the same cause.

*Provided always*, that no petition for review shall be sustained after one year and six months from the time of rendering judgment in the action; (1) and only one review shall ever be granted by virtue of the act.

*Ibid.* s. 4.

How prosecuted.

4. Whenever a review is granted by virtue of the act, a writ of review shall be sued out and prosecuted to final judgment and execution, in the same manner as is provided in other actions of review.

(1) See the additional act, 1791, c. 17, s. 2.

5. The justices aforesaid to whom any petition shall be preferred in manner aforesaid, are further empowered to stay execution in the cause, on such conditions as are before mentioned. And whenever the same justices shall adjudge that the petitioner shall take nothing by his petition, they are also empowered to award the respondent his reasonable costs, and execution may be sued out accordingly.

*Ibid.* s. 5.

In what cases execution may be stayed?

Costs.

Thus much as to the act of 1788, c. 11. We will now consider the additional act.

2. The stat. 1791, c. 17.

Stat. 1791, c. 17, s. 1.

1. The first section provides for the entry of an appeal or complaint, at the supreme judicial court, where such entry was omitted at the *proper* term, by reason of any accident, mistake, or unforeseen cause. But this part of the act has been already fully noticed under a former title.(2)

Entry of appeals and complaints, by petition.

2 The second section vests the justices of the supreme judicial court, with discretionary power to grant reviews in civil actions, whenever they shall judge it to be reasonable, without being limited to particular cases:(3) *Provided*, that application be made within three years after the rendition of the judgment complained of.

Sec. 2.

Additional power of the supreme judicial court, in regard to reviews.

Within what time, petition must be made.

3. By the third section, every court of common pleas, within the commonwealth is vested with the same powers, respecting appeals made from judgments rendered by justices of the peace, and complaints for not entering the same, and also respecting all actions and suits before justices of the peace, wherein the defendant has been defaulted, for want of actual notice of the suit, or by some

Sec. 3.

Power granted to the common pleas, relative to reviews, and the entry of appeals and complaints.

(2) See title APPEAL, p. 85.

(3) A writ of review does not lie upon a judgment of the court of common pleas rendered upon the report of referees, appointed pursuant to the statute of 1786, c. 21, where there was no writ: for when a review is grantable the cause must be *triable* on a review. It must therefore be commenced by writ.

Dickenson v. Davis, 4 Mass. Rep. 520.

other accident or mistake, with which the justices of the supreme judicial court are by the act vested, respecting appeals from judgments rendered by courts of common pleas, and complaints for not entering the same, and respecting the granting reviews in the certain other actions or suits before mentioned, wherein the defendant has been defaulted or lost his law.

Having thus noticed the two statutes in detail ; we will now attend to the decisions of our supreme judicial court.

*Willard v. Ward,*  
3 Mass. Rep. 24.

The court will require affidavits of the facts stated in a petition for review, before making a rule to shew cause.

4 Mass. Rep. 379.

In *Judd v. Bughanan*, the petitioner stated only that he *intended* to have made a defence in the former action, and that he was defaulted by accident : but the petition did not contain any denial that he owed the amount of the judgment recovered. The court perceiving that the declaration in the original action was very defective, and the demand of such a nature, that the defendant would not, probably, have voluntarily suffered judgment to go by default, said, that though the affidavit was very imperfect, the review ought to be granted upon terms ; and it was accordingly granted :—the respondent to have leave to amend his declaration, and the costs of the review to be subject to the discretion of the court, according to the merits, as they should afterwards appear.

*Simmons and al. v. Apthorp and al.*  
1 Mass. Rep. 99.

In a petition for review, the petitioner is confined to the facts which form the ground of his application, and which are alleged in the petition itself.

*Rogers v. Hill,*  
4 Mass. Rep. 349.

So the affidavit of a petitioner for a review is not received, except as to facts exclusively known to himself, or to obtain an order of notice.

*Woodward v. Skolfield,*  
4 Mass. Rep. 375.

So a petition for a review abates by the death of the petitioner, pending the petition ; and his executor cannot be admitted to prosecute it.

*Hart v. Huckins,*  
5 Mass. Rep. 200.

Where, upon a petition for review, the court perceive, on inspection of the papers, that the judgment complain-

ed of, would be reversed upon error, they will not grant a review.

III. Of review in *real actions*, after the death of one or both of the original parties.

By statute, when in any real action, the demandant shall recover judgment for his seizin and possession of the demanded tenements, and shall die within the term allowed by law to the defendant, to review the same judgment; it shall be lawful for him, within the said term, to sue out and prosecute his writ of review for the reversal thereof, against the person in the actual possession of such tenements, or against him who hath right to hold the same under the demandant, (in case the said judgment shall not be reversed,) or both of them, at his election.

Stat. 1788, c. 47, s. 1.  
Where the demandant dies.

And when, in any such real action as aforesaid, judgment shall be rendered for the defendant for his costs, and he die within the term allowed by law, to the demandant, to review the same judgment; it shall be lawful for him, within the same term, to sue out and prosecute his writ of review, for the reversal thereof, against the person in the actual possession of the demanded tenements, or against him who hath right to hold the same, under the original defendant, (in case the said judgment shall not be reversed,) or both of them, at his election.

Ibid.  
Where the defendant dies.

And when both the demandant and defendant, or either of them, shall die after judgment rendered in the original suit, it shall be lawful for the heirs at law, of the party against whom judgment shall have been rendered in such suit, or for any other person having a right under such party, to the seizin and possession of the demanded tenements, (in case the last judgment shall not be reversed within the term allowed by law,) to sue out and prosecute their writ of review, for the reversal thereof, in manner and form as aforesaid, or against the party who recovered in the original suit, if living.

Ibid.  
In case the demandant and defendant, or either of them die, after judgment in the original suit.

Ibid.

Proceedings and judgment.

And in the several cases mentioned in this enacting clause, the same proceedings and judgment shall be had, *mutatis mutandis*, as would have been had between the original demandant and defendant, if they had been in full life, and the writ of review had been pending between them.(4)

IV. Of review in *personal* actions, after the death of one or both of the original parties.

Ibid. s. 2.

The same statute has further enacted, that when judgment shall be recovered in any personal action, and one or both of the original parties shall die within the term allowed by law, to review the same judgment, (no writ of review being pending between them,) it shall be lawful, either for the surviving party, or for the executors or administrators of the deceased party or parties, (where both of them shall die as aforesaid,) within the same term, to sue out and prosecute a writ of review, for the reversal of the same judgment.

Ibid.

And the same proceedings and judgment shall be had therein, *mutatis mutandis*, as would have been had between the original parties.

V. Proceedings where either of the parties die, pending a writ of review.

Ibid s. 3.

The same statute has further enacted, that if, pending a writ of review, between the original parties, whether in a real or personal action, either of them shall die, his death shall, at the request of the attorney for either party, be entered upon the records of the court, and the cause shall thereupon be continued, to the end the heirs at law of such deceased party, or other person interested in the tenements in question, as aforesaid, or his executors or

(4) The provisions under this and the two following heads, apply exclusively to cases, where the party may review by *right*, and not where he *petitions*. For a petition abates on the death of the petitioner. Woodward v. Skolfield, 4 Mass. Rep. 375.

administrators, (as the case may be,) may come into court, and take upon them the prosecution or defence of the same suit, to final judgment.

And if, after a reasonable time, according to the discretion of the court, granted for this purpose, neither of them shall appear as aforesaid, or, appearing, shall afterwards become non-suit, or be defaulted; then the same proceedings and judgment shall be had therein, *mutatis mutandis*, as would have been had between the original parties. <sup>Ibid.</sup>

VI. Of the trial, pleadings, evidence, reversal of judgment, and damages in writs of review.

In review, there shall be no farther pleadings, but the action shall be tried upon the review, by the issue appearing upon the record to have been originally joined by the parties; nor shall execution on the judgment reviewed be stayed by such review, unless a bond shall be given, as provided by the statute. <sup>Stat. 1786, c. 66, s. 1.</sup>

So, when either party shall bring an action of review, and enter the same, the whole cause shall be tried in the same manner as if no judgment had been given thereon; and the former judgment may be reversed in whole or in part, or greater damages, or less, or no damages, may be given, as the merits of the cause, upon law, and the evidence shall appear to require, in the same manner, as if both parties had brought their several writs of review. <sup>Ibid. s. 2.</sup>

VII. Of the reversal of judgment and costs, where there were several original defendants, against whom joint damages were recovered, and one, only, brings review.

When there are more than one original defendant, against whom joint damages are recovered, and one or more, but not all of them, shall review the cause; he or they shall purchase the writ therefor, in the name of all the original defendants. <sup>Ibid. s. 3.</sup>

Ibid.

And if any of the original defendants shall not appear, their non-appearance shall be entered upon the court's record.

Ibid.

And he or they who shall appear in support of the review, may prosecute the same to final judgment.

Ibid.

And if he or they who shall prosecute the same, shall obtain a reversal of the former judgment, in whole, he or they shall be entitled to costs, and a restoration of the damages by him or them respectively paid in satisfaction of the former judgment.

Ibid.

And if he or they, who shall prosecute as aforesaid, shall obtain a reversal of the former judgment, in part only, he or they shall be entitled to costs, and a restoration of so much of the damages, by him or them respectively paid in satisfaction of the former judgment, as the former judgment may have exceeded the judgment upon the review as aforesaid.(5)

VIII. Of the reversal of judgment and costs, where there were more than one original defendant, against whom *several* damages were recovered, and one, only, brings review.

Ibid. s. 4.

When several damages are given against several defendants, either of them may review in the same manner as if there was no other original defendant in the cause.

Ibid.

And if he shall obtain a reversal of the former judgment, in whole, as to him, he shall be entitled to a restoration of all damages and costs by him paid.

Ibid.

And if he shall obtain a reversal of the former judgment, in part only, he shall be entitled to costs, and a restoration of so much of the damages by him paid, in satisfaction of the former judgment, as the former judgment may have exceeded the judgment upon the review as aforesaid.(6)

(5) See title Costs, p. 342.

(6) See title Costs, p. 342.

IX. Proceedings by which original defendants, being plaintiffs in review, may obtain stay of execution.

This topic, having already been fully noticed under a former title, I shall omit again noticing it, in this place, further than referring the reader to the page where it is contained.(7)

#### X. How writs of review may be served.

Such writs may be served, by the officer's reading the writ or original summons to the defendant, or by leaving a true copy thereof, at his or her house or place of last and usual abode, attested by such officer, fourteen days before the day of the court's sitting, whereto the same process shall be returnable. Stat. 1797, c. 80, s. 2.

But when any party against whom any review is commenced, shall not be an inhabitant of this commonwealth, the writ may be served upon such person as appeared for him in the former trial, or upon the agent of the said party, his attorney, or trustee, which shall be deemed a sufficient service. And in such case, the court may at their discretion, continue the cause for one or more terms, in order for the party to have personal notice, if they shall think that justice requires it. Stat. 1786, c. 66, s. 5.

So, in all real actions, where the defendant or defendants in review, live out of the commonwealth, so that the writ of review cannot be served upon him or them, the service of such writ upon the tenant, or person in possession, shall be deemed a good and sufficient service, and the defendant or defendants shall be held to answer thereupon accordingly. Ibid. s. 7.

(7) See title EXECUTIONS, p. 516, 517.

TITLE CXXXI.

RIOTS, ROUTS, AND UNLAWFUL  
ASSEMBLIES.

4 Bl. Com. 146.

1. **A**n *unlawful assembly* is when three or more assemble themselves together to do an unlawful act, as to pull down inclosures, and the like, and part without doing it, or making any motion towards it.

*Ibid.*

2. A *rout* is, where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common, or of way ; and make some advances towards it.

*Ibid.*

3. A *riot* is, where three or more actually do an unlawful act of violence, either with or without a common cause of quarrel : as if they beat a man, or do any other unlawful act with force and violence ; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner.

*Ibid.* 147.

When the number of persons assembled do not amount to twelve, the punishment is fine and imprisonment only.

But what deserves the most consideration under the present title, is the riotous assembling of *twelve* persons, or more, and not dispersing upon proclamation : as to which, we have a statute, which will now be noticed under the following heads :

1. The proclamation to rioters.
2. The power of civil officers in regard to suppressing riots.
3. Penalty for refusing aid to such officers.
4. Punishment for unlawfully continuing together one hour after proclamation ; or for opposing the proclamation.

5. Punishment for demolishing, or beginning to demolish any building.

6. Power of the court to abate the punishments provided by the act.

7. At what times the act must be read.

8. Within what time offences against the act must be prosecuted.

# I. The proclamation to rioters.

If any persons to the number of twelve or more, being armed with clubs, or other weapons; or if any number of persons, consisting of thirty or more, shall be unlawfully, routously, riotously, or tumultuously assembled; any justice of the peace, sheriff, or deputy-sheriff of the county, or constable of the town, shall, among the rioters, or as near to them as he can safely come, command silence while proclamation is making, and shall openly make proclamation, as directed by the act. Stat. 1786, c. 38, s. 1.

The form of this proclamation may be seen in the appendix. See Append. No. 2.

# II. The power of civil officers in regard to suppressing riots.

If such persons assembled as aforesaid, shall not disperse themselves within one hour after proclamation made or attempted to be made, it shall be lawful for every such officer to command sufficient aid, and he shall seize such persons, who shall be had before a justice of the peace. And the justice, sheriff, or deputy-sheriff, is further empowered to require the aid of a sufficient number of persons in arms, if any of the persons assembled shall appear armed. And if any such person or persons shall be killed or wounded, by reason of his or her resisting the persons endeavouring to disperse or seize them, the said justice, sheriff, deputy-sheriff, constable, and their assistant, shall be indemnified and held guiltless. Stat. 1786, c. 38, s. 1.

## III. Penalty for refusing aid to such officers.

*Ibid.* s. 2.

If any person, being commanded by such justice, sheriff, deputy-sheriff, or constable, shall refuse or neglect to afford the assistance required, and shall be convicted thereof, upon the oath of either of the said officers so commanding, or other legal evidence, he shall forfeit and pay a sum not less than *forty shillings*, nor exceeding *ten pounds*, to be recovered by indictment or presentment, before the supreme judicial court or any court of sessions, according to the aggravation of the offence; to be paid into the public treasury, for the use of the commonwealth.

## IV. Punishment for unlawfully continuing together one hour after proclamation; or for opposing the proclamation.

*Ibid.* s. 3.

All persons who, for the space of one hour after proclamation made, or attempted to be made, as aforesaid, shall unlawfully, routously, riotously, and tumultuously continue together, or shall wilfully let or hinder any such officer, who shall be known, or shall openly declare himself to be such, from making the proclamation, shall forfeit all their lands, tenements, goods and chattels to the commonwealth, or such part thereof as shall be adjudged by the justices, before whom such offence shall be tried, to be applied towards the support of the government of the commonwealth; and shall be whipped thirty-nine stripes on the naked back, at the public whipping post, and suffer imprisonment for a term not exceeding twelve months, nor less than six months; and once every three months, during the said imprisonment, receive the same number of stripes on the naked back at the public whipping post as aforesaid.

## V. Punishment for demolishing, or beginning to demolish any building.

*Ibid.*

If any such person or persons, so riotously assembled, shall demolish or pull down, or begin to demolish or pull

down, any dwelling house, or other house, or parcel thereof; any house built for public uses; any barn, mill, malt-house, store-house, shop or ship; he or they shall suffer the same pains and penalties as are mentioned under the head immediately preceding.

VI. Power of the court to abate the punishments provided by the act.

Where there shall appear any circumstances to mitigate or alleviate any of the offences against the act, in the judgment of the court, before which the offence shall be tried, it shall be lawful for the justices of such court to abate the whole of the punishment of whipping, or such part thereof as they shall judge proper. <sup>Ibid.</sup>

VII. At what times the act must be read.

The act shall be read at the opening of every court of sessions, by the clerk thereof, and at the anniversary meeting of each town within the commonwealth, by the town-clerk thereof, in March or April, annually. <sup>Ibid. s. 4.</sup>

VIII. Within what time offences against the act must be prosecuted.

No person shall be prosecuted for any offence contrary to the act, unless such prosecution be commenced within twelve months after the offence committed. <sup>Ibid.</sup>

TITLE CXXXII.

ROBBERY.

**R**OBBERY is a felonious taking of money or goods, to  
3 East's C. L. 707. any value, from the person of another, or in his presence,  
 against his will, by violence, or putting him in fear.

1. Of the value of the property taken.
2. What is a taking from the person.
3. What violence or fear is necessary.
4. The punishment.

I. Of the value of the property taken.

4 Bl. Com. 247. It is immaterial of what value the thing taken is: a  
 penny as well as a pound, forcibly extorted, makes a robbery.

II. What is a taking from the person.

3 East's C. L. 707. It is sufficient if the property be taken in the presence  
 of the owner. It need not be taken immediately from  
 his person, so that there be violence to his person, or  
 putting him in fear.

Ibid. As where one, having first assaulted another, takes  
 away his horse standing by him; or, having put him in  
 fear, drives his cattle out of his pasture in his presence,  
 or takes up his purse, which the other in his fright had  
 thrown into a bush, or his hat which had fallen from his  
 head.

III. What violence or fear is necessary.

4 Bl. Com. 242. This previous violence, or putting in fear, is the cri-  
 terion that distinguishes robbery from other larcenies.  
 For if one privately steals sixpence from the person of  
 another, and afterwards keeps it by putting him in fear,  
 this is no robbery, for the fear was subsequent.

It is not necessary, though it is usual, to lay, in the indictment, that the robbery was committed by *putting in fear*: it is sufficient, if laid to be done by *violence*. <sup>Ibid.</sup>  
2 East's C. L. 708.

And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed: it is enough that so much force, or threatening, by word or gesture, be used, as might create an apprehension of danger, or induce a man to part with his property without or against his consent. <sup>Ibid.</sup>  
4 Bl. Com. 343.

Thus if a person, with a sword drawn, begs alms, and I give it to him through mistrust and apprehension of violence, this is a felonious robbery. <sup>Ibid.</sup>

So if, under a pretence of sale, a man forcibly extorts money from another, this subterfuge shall not avail him. <sup>Ibid.</sup>

But no sudden taking of a thing unawares from the person, as by snatching any thing from the hand or head, is sufficient to constitute a robbery, unless some injury be done to the person, or there be some previous struggle for the possession of the property; or unless the party from whom the property is taken, be deterred from resistance, by fear. <sup>2 East's C. L. 708.</sup>

#### IV. The punishment.

By statute, any person who shall, by force and violence, or by other assault and putting in fear, feloniously steal, rob, and take from the person of another, any money or goods, bank note, bill of exchange, or other negotiable bill, note, or order; due or in force, or any other property which may be the subject of larceny, shall be adjudged guilty of the crime of robbery. And every such offender, and any person present, aiding and abetting in the commission of such felony, or accessory thereto before the fact, by counselling, hiring, or procuring the same to be done, who, in the supreme judicial court, shall be duly convicted of either of the felonies and offences aforesaid, shall be punished by solitary imprisonment for a term not exceeding two years, and by confinement afterwards, to hard labour for life. <sup>Stat. 1804, c. 143, s. 7.</sup>

**TITLE CXXXIII.**

**SALES BY EXECUTORS, ADMINISTRATORS,  
AND GUARDIANS.**

**T**HIS subject, having been partially considered under former titles(1), the object in again noticing it in this place, is merely to supply previous omissions.

1. The power of executors and administrators to execute deeds to purchasers, under a license to sell real estate; and herein of the notification of such sale.

2. Power and duty of executors, administrators, and guardians, when empowered to sell the whole estate, where a partial sale would be injurious to the remainder; and herein of the notice of such sale, and the bonds to be given by such executor, administrator, or guardian.

3. Of the certificate of the judge of probate, which must accompany a petition for the sale of real estate, by executors, administrators, and guardians.

4. Duty of the court to order notice to parties interested, before granting license of sale.

5. Mode of perpetuating evidence that notice was given respecting the sale of real estate, by executors, administrators, and guardians.

6. Power of courts to grant licenses to executors and administrators to convey real estate, according to the contract of the deceased, in his life time.

I. The power of executors and administrators to execute deeds to purchasers, under a license to sell real estate; and herein of the notification of such sale.

Every executor or administrator being so licensed and authorized, may, by virtue of such authority, make, sign,

Stat. 1783, c. 32, s. 1.

(1) See title EXECUTORS AND ADMINISTRATORS, p. 534.—See also, title GUARDIANS, p. 651, 652.

and execute, in due form of law, deeds and conveyances for such houses, lands or tenements as they shall so sell, which instruments shall make as good a title to the purchaser, his heirs and assigns, forever, as the testator or intestate, being of full age, of sane mind and memory, in his or her lifetime, might or could for a valuable consideration: *Provided always*, that the executor or administrator, before sale be made as aforesaid, give thirty days public notice, by posting up notifications of such sale, in the town or plantation where the lands lie, as well as where the deceased person last dwelt, and in the two next adjoining towns, as also in the shire town of the county; and whosoever will give most, shall have the preference in such sale; and in case it be an insolvent estate, the whole produce of such sale shall be divided in due proportion to and among the creditors.

II. Power and duty of executors, administrators, and guardians, when empowered to sell the whole estate, where a partial sale would be injurious to the remainder; and herein of the notice of such sale, and the bonds to be given by such executor, administrator, or guardian.

Executors, administrators, and guardians, when thus empowered, may execute a deed of conveyance to the purchaser; which deed, when duly acknowledged and recorded in the registry of deeds for the county where the real estate lies, shall make a complete and legal title in fee to the purchaser or purchasers thereof; provided the said executors, administrators, or guardians, give thirty days public notice of such intended sale in manner and form herein before prescribed; and provided also they first give bonds, with sufficient sureties, to the judge of probate for the county where the deceased testator or intestate last dwelt, and his estate inventoried, that he or she will observe the rules and directions of law, for the sale of real estates by executors or administrators, and that the proceeds of the said sale, after the payment of just debts, legacies, taxes, and just debts for the sup-

*Ibid.* s. 2.

port of minors, and other legal expenses and incidental charges, shall be put on interest on good security, and that the same shall be disposed of agreeable to the rules of law.

III. Of the certificate of the judge of probate, which must accompany a petition for the sale of real estate, by executors, administrators, and guardians.

*Ibid.* a. 3.

Every representation to be made as aforesaid, shall be accompanied with a certificate from the judge of probate of the county, where the deceased person's estate was inventoried, certifying the value of the real estate and the value of the personal estate of such deceased person, and the amount of his or her just debts; and also his opinion, whether it be necessary that the whole or a part of the estate should be sold, or if part only, what part.

IV. Duty of the court to order notice to parties interested, before granting license of sale.

*Ibid.*

The justices of the court, previous to their passing on the said representation, shall order due notice to be given to all parties concerned, or their guardians, who do not signify their consent to such sale, to shew cause, at such time and place as they shall appoint, why such license should not be granted.

*Ibid.*

And in case any person concerned in the said sale be not an inhabitant of this commonwealth, nor have any guardian, agent, or attorney therein, who may represent him or her, the said justices may cause the said petition to be continued for a reasonable time; and the petitioner or petitioners shall give personal notice of the said petition to such absent person, his or her agent, attorney, or guardian, or cause the same to be published in some one of the *Boston* newspapers, three weeks successively.

*Ibid.*

And the said justices, where they may think it expedient, may examine the said petitioner or petitioners, on oath, touching the truth of facts set forth in the said petition, and the circumstances attending the same.

V. Mode of perpetuating evidence that notice was given respecting the sale of real estate, by executors, administrators, and guardians.

By statute it is enacted, that the affidavit of the executor or administrator, or the affidavit of such person or persons as may be by them employed, to post up notifications, taken before the probate court, where such executor or administrator derived his authority to administer, within seven months next following the sale of the real estate, and there filed and recorded, together with one of the original advertisements of the time, place, and estate to be sold, or a copy of such advertisement, are declared to be, one mode of perpetuating the evidence that such notice was given, and also to make the originals or copies thereof, from the register of the probate court, admissible evidence in any court of law.

Stat. 1788, c. 66, s. 6.

Evidence that notice was given by executors and administrators.

And when the person employed by the executor or administrator, to post up such notifications, resides more than ten miles distant from such probate court, his deposition respecting that matter, taken before a justice of the peace, and filed in such probate court, within the seven months as aforesaid, shall have the same force and effect, as if the same was taken before the probate court; and the printing a notification, three weeks successively, in such gazette or newspaper, as the court who may authorize the sale, shall order and direct, shall be deemed equivalent to the posting up of notifications as aforesaid.

Ibid.

Evidence where the person employed to post notifications, resides more than ten miles from the probate court.

The same statute has further enacted, that guardians and others, who upon obtaining license for the sale of real estate, are or shall be directed to give public notice before sale be made, are authorized to perpetuate the evidence, that such notice was given, in the probate court, where the guardian, or other person selling, is directed to account for the proceeds arising from the sale; in the same way and manner before provided for executors or administrators.

Ibid. s. 7.

Evidence for guardians.

VI. Power of courts to grant licenses to executors and administrators to convey real estate, according to the contract of the deceased, in his life time.

Stat. 1783, c. 33, § 4.

By statute it is enacted, that whenever it shall be represented and made to appear to the justices, by any person or persons, contracted with by bond, covenant or other contract under seal, that a deceased testator or intestate, in his or her life time, entered into such bond, covenant or contract, to convey some real estate to him or her, but was prevented by death; and that such person or persons, contracted with as aforesaid, have, on his, her or their part performed, or stand ready to perform, the conditions of such bond, covenant or contract made with the deceased, the said justices may, after due notice given to all concerned as aforesaid, in form aforesaid, and a full hearing had, grant license to, and empower the executors or administrators of such deceased, obligor, covenantor or contractor, to make and execute such conveyance or conveyances, to such person or persons contracted with as aforesaid, as it shall appear the said obligor, covenantor or contractor, would by his bond, covenant or contract, be obliged to make and execute, in case he, she or they were living at the time of the performance of the conditions of the bond, covenant or contract by the contractees on their part, making reasonable allowances for any alteration, improvements or injuries, that may be made or done in the same estate since such contract was made, as the said justices may award.

Ibid.

Which conveyance or conveyances, when the instruments thereof are duly acknowledged and recorded in the registry of deeds for the county where such estate shall lie, shall be good and valid.

Ibid.

And the moneys or consideration paid for such estate, if not paid to the deceased contractor in his life time, shall be assets in the hands of the said executors or administrators, and be apportioned among the representatives of the deceased as other personal estate.

TITLE CXXXIV.

SCHOOLS AND SCHOOL-MASTERS.

1. **D**UTY of towns to be provided with school-masters.
2. Penalties for neglect of such duty.
3. Mode of collecting and appropriating such penalties.
4. Of the necessary qualifications of school-masters.
5. Duty of school committees.
6. Of school districts ; and district meetings.
7. Of taxes for the support of schools.

I. Duty of towns to be provided with school-masters.

By statute it is enacted, that every town or district within this commonwealth, containing *fifty* families, or householders, shall be provided with a good school-master or school-masters of good morals, to teach children to read and write, and to instruct them in the English language, as well as in arithmetic, orthography, and decent behaviour, for such term of time as shall be equivalent to *six months* for one school in each year.

Stat. 1789, c. 19, s. 1.

Towns, etc. containing fifty families.

And every town or district, containing *one hundred* families or householders, shall be provided with such school-master or school-masters, for such term of time as shall be equivalent to *twelve months* for one school in each year.

Towns, etc. containing one hundred families.

And every town or district, containing *one hundred and fifty* families or householders, shall be provided with such school-master or school-masters, for such term of time as shall be equivalent to *six months* in each year ; and shall, in addition thereto, be provided with a school-master or school-masters as above described, to instruct children in

Ibid.

Towns, etc. containing one hundred and fifty families.

the English language, for such term of time as shall be equivalent to *twelve months* for one school in each year.

*Ibid.*

Towns, etc. containing two hundred families.

And every town or district, containing *two hundred* families or householders, shall be provided with a grammar school-master of good morals, well instructed in the Latin, Greek, and English languages, and shall in addition thereto, be provided with a school-master or school-masters as above described, to instruct children in the English language, for such term of time as shall be equivalent to *twelve months* for each of said schools in each year.

## II. Penalties for neglect of such duty.

*Ibid.*, s. 6.

In the case of towns, etc. having fifty and less than one hundred families.

By statute it is enacted, that if any town or district, having the number of *fifty* families or householders, and less than *one hundred*; shall neglect the procuring and supporting a school-master or school-masters, to teach the English language as aforesaid, by the space of *six* months in one year, such deficient town or district shall incur the penalty of *ten pounds*, and a penalty proportionable for a less time than six months in a year, upon conviction thereof; and upon having *one hundred* families or householders and upwards, shall neglect the procuring and supporting such school-master or school-masters as is required to be kept by such town for the space of one year, every such deficient town or district, shall incur the penalty of *twenty pounds*, and a proportionable sum for a less time than a year, upon conviction of such neglect.

In the case of towns, etc. having one hundred families and upwards.

*Ibid.*

In the case of towns, etc. having one hundred and fifty families.

And every town or district, having *one hundred* and *fifty* families or householders, which shall neglect the procuring and supporting such school-masters, and for such term of time as the schools aforesaid are herein required to be kept by such town or district, in any one year, shall incur the penalty of *thirty pounds*, and a proportionable sum for a less time, upon conviction of such neglect.

And every town or district, having *two hundred families* or householders and upwards, that shall neglect the procuring and supporting such grammar school-master as aforesaid, for the space of one year, shall incur the penalty of *thirty pounds*, and a proportionable sum for a less time than a year, upon conviction of such neglect.

*Ibid.*

*In the case of towns, etc. having two hundred families and upwards.*

### III. Mode of collecting and appropriating such penalties.

By the same statute it is further enacted, that the penalties which may be incurred by virtue of the act, shall be levied by warrant from the supreme judicial court, or court of general sessions of the peace, for the county to which such deficient town or district belongs, upon the inhabitants of such deficient town or district, in the same manner as other sums for the use of the county, and shall be paid into the county treasury, and the same shall be appropriated for the support of such school or schools as are prescribed by this law, in such town or towns, district or districts in the same county, as shall have complied with this law, and whose circumstances most require such assistance, or in such plantation or plantations in the same county, as the said court of sessions shall order and direct.

*Ibid. s. 7.*

### IV. Of the necessary qualifications of school-masters.

By the same statute it is further enacted, that no person shall be employed as a school-master as aforesaid, unless he shall have received an education at some college or university, and before entering on the said business, shall produce satisfactory evidence thereof, or unless the person to be employed as aforesaid, shall produce a certificate from a learned minister, well skilled in the Greek and Latin languages, settled in the town or place where the school is proposed to be kept, or two other such ministers in the vicinity thereof, that they have reason to believe he is well qualified to discharge the duties devolved upon such school-master by this act: and in ad-

*Ibid. s. 8.*

*Certificate of their abilities.*

dition thereto, if for a grammar school, "that he is of competent skill in the Greek and Latin languages, for the said purpose."

*Ibid.*

Certificate of their morals.

And the candidate of either of the descriptions aforesaid, shall moreover produce a certificate from a settled minister of the town, district, parish or place, to which such candidate belongs, or from the selectmen of such town or district, or committee of such parish or place, "that to the best of his or their knowledge, he sustains a good moral character."

*Ibid.*

In what cases such certificate of morals is not necessary.

*Provided nevertheless*, this last certificate respecting morals, shall not be deemed necessary, where the candidate for such school belongs to the place where the same is proposed to be actually kept; it shall however be the duty of such selectmen or committee, who may be authorized to hire such school-master, specially to attend to his morals; and no settled minister shall be deemed, held or accepted to be a school-master, within the intent of this act.

*Ibid.* s. 8, and 9.

Teachers of schools for young children... what certificate is necessary in regard to them.

As to schools for the education of children in the more early stages of life, it is provided, that no person shall be allowed to be a master or mistress of such school, or to keep the same, unless he or she shall obtain a certificate from the selectmen of such town or district where the same may be kept, or the committee appointed by such town, district or plantation to visit their schools, as well as from a learned minister settled therein, if such there be, that he or she is a person of sober life and conversation, and well qualified to keep such school.

*Ibid.* s. 9.

Their general duty.

And it shall be the duty of such master or mistress, carefully to instruct the children attending his or her school in reading, (and writing if contracted for,) and to instil into their minds a sense of piety and virtue, and to teach them decent behaviour.

*Ibid.*

Penalty for keeping such school without a certificate.

And if any person shall presume to keep such school, without a certificate as aforesaid, he or she shall forfeit and pay the sum of *twenty shillings*, one moiety thereof to the informer, and the other moiety to the use of the

poor of the town, district or plantation, where such school may be kept.

The same statute has further enacted, that no person shall be permitted to keep within this commonwealth, any school described in the act, unless in consequence of an act of naturalization, or otherwise, he shall be a citizen of this or some other of the United States; <sup>Ibid. s. 10.</sup> and if any person who is not a citizen of this or some one of the United States, shall presume to keep any such school within this state for the space of one month, he shall be subject to pay a fine of *twenty pounds*, and a proportionable sum for a longer or shorter time; the one half of which fine shall be to the use of the person who shall sue for the same, and the other half thereof to the use of this commonwealth. <sup>None but citizens of the United States allowed to keep a school.</sup>

#### V. Duty of school committees.

It shall be the duty of the minister or ministers of the gospel, and the selectmen, (or such other persons as shall be specially chosen by each town or district for that purpose,) of the several towns or districts, to use their influence and best endeavours, that the youth of their respective towns and districts do regularly attend the schools appointed and supported as aforesaid, for their instruction; and once in every six month at least, and as much oftener as they shall determine it necessary, to visit and inspect the several schools in their respective towns and districts, and shall inquire into the regulation or discipline thereof, and the proficiency of the scholars therein, giving reasonable notice of the time of their visitation. <sup>Ibid. s. 7.</sup>

#### VI. Of school districts; and district meetings.

The several towns and districts in this commonwealth, are authorized and empowered, in town meeting, to be called for that purpose, to determine and define the limits of school districts within their towns and districts respectively. <sup>Ibid. s. 2.</sup> <sup>Towns, etc. empowered to define the limits of school districts.</sup> (1)

(1) Towns may alter the limits of, or subdivide any school districts, without changing the limits of all.

Richards v. Daggett and al. 4 Mass. Rep. 534.

Stat. 1799, c. 66.

Districts empowered to raise money for the purpose of erecting or repairing of school-houses, and to call meetings for other purposes.

To choose a clerk.

His duty.

Ibid. s. 4.

Warrant of the selectmen for calling a district meeting; in what cases it shall be granted.

Ibid.

How the inhabitants are to be warned.

By statute, the inhabitants of the several school districts within any town which had already, or should thereafter define the limits of such districts, qualified to vote in town affairs, are empowered, at any meeting called in manner therein after provided, to raise money for erecting or repairing a school-house, in their respective districts, to determine in what part of the district to erect said house, to choose a committee to superintend the building and repairing the same, and to choose a clerk, who shall be sworn faithfully to discharge the duties of his office; whose duty it shall be, to make a fair record of all votes passed at any meeting of the district, and to certify the same when required; also, at any such meeting, to raise money to procure necessary utensils for their respective school-houses, to be certified as aforesaid, and assessed in manner as is provided by the act.(2)

The same statute has further enacted, that it shall be the duty of the selectmen of the several towns divided into school districts, upon application made to them, in writing, by three or more freeholders, resident within any school district in their respective towns, to issue their warrant directed to one of the persons making such application, requiring him to warn the inhabitants of such district, qualified to vote in town affairs, to meet at such time and place, in the same district, as the selectmen shall in their warrant appoint.

And the warning aforesaid, shall be by notifying personally, every person in the district qualified to vote in town affairs, or by leaving at their usual place of abode, a notification, in writing, expressing therein the time,

If after the inhabitants of a school district have voted to raise money for building a school-house, and before the same is assessed, the town shall set off certain inhabitants, and form them into a separate district, such inhabitants are not liable to be assessed for the money so voted. Ibid.

(2) See title Assessors, vol. 1, p. 130, 131, 132.

place, and purpose of the meeting, seven day at least, before the time appointed for holding the same.

And any vote to raise money, for the purpose of erect-  
ing or repairing a school-house, passed by a majority of  
the inhabitants of a school district, present at a district  
meeting, warned and held as aforesaid, shall be obligatory  
on the inhabitants of said school district, to be assessed,  
levied and collected in the manner prescribed by the  
act.(3)

*Ibid.*

Vote of the district  
obligatory on the in-  
habitants thereof.

*Ibid. s. 5.*

Location of school-  
houses.

The same statute has further enacted, that if the in-  
habitants of any school district cannot agree where to  
erect a school-house; for the accommodation of the  
same, the selectmen of the town to which such district  
belongs, upon application made to them by the com-  
mittee of the district, are authorized to determine on the  
place where a school-house, for the use and accommoda-  
tion of the district, shall be erected.

By an additional act, the inhabitants of the several  
school districts, are empowered to raise money at any  
legal meeting called for that purpose, to purchase any  
house or building to be used as a school-house; and also,  
to purchase land for the school-house of the district to  
stand upon.

*Stat. 1802, c. 11.*

Districts empowered  
to purchase buildings  
for school-houses, etc.

## VII. Of taxes for the support of schools.

By statute it is enacted, that all plantations which shall  
be taxed to the support of government, and all parishes  
and precincts, are authorized and empowered at their  
annual meeting in *March or April*, to vote and raise such  
sums of money upon the polls and ratable estates of their  
respective inhabitants, for the support and maintenance  
of a school-master to teach their youth and children to  
read, write, and cypher, as they shall judge expedient,  
to be assessed by their assessors in due proportion, and  
to be collected in like manner, with the public taxes.

*Stat. 1789, c. 10, s. 8.*

(3) See title *Assessors*, vol. 1, p. 130, 131, 132.

TITLE CXXXV.

SESSIONS.

By statute, 1782, c. 14, entitled "*an act for establishing courts of general sessions of the peace*," it is provided,

Sec. 1.

Jurisdiction and  
power of the ses-  
sions.

1. That there shall be held in each county in this commonwealth, at the times and places by law appointed, a court of general sessions of the peace, by the justices of each county, who are empowered to hear and determine all matters relative to the conservation of the peace, and the punishment of such offences as are cognizable by them at common law,(1) or by the acts and laws of the legislature, and to give judgment, order or sentence thereon as the law directs, and to award execution accordingly.

Sec. 2.

Warrants and pro-  
cesses of such court.

2. That the warrants and processes of the said court, for the apprehending and bringing to trial any person against whom an indictment is found, or a complaint filed in the same court, for any crime whereof the same court hath cognizance, shall be under the seal of the court, shall be signed by their clerk, and run into, and be executed in any county of the commonwealth.

Sec. 3.

Appeal.

When to be claimed.

Appellant to recog-  
nize.

3. That any person against whom a sentence shall be given in such court, may appeal therefrom, unto the supreme judicial court, then next to be holden within or for the same county: *Provided*, that no appeal shall be granted, unless it be claimed at the time of declaring the sentence, and unless the appellant shall, before the rising of the court, recognize to the commonwealth, and, where by the sentence a forfeiture accrues to a subject, to him,

(1) See title COMMON PLEAS, vol. 1, P. 2. p. 318.

in a reasonable sum, with surety or sureties, for his personal appearance at the court appealed to, and for the prosecution of his appeal there with effect, and to abide the sentence therein given, and to keep the peace and be of the good behaviour in the mean time. And the party appealing shall be in custody until he shall so recognize.

Party appealing to be in custody until he recognizes.

And the party appealing shall produce at the court appealed to, a copy of the sentence given against him, with a copy of all other proceedings had in the cause, and shall enter his appeal, and pay all fees in the said supreme court as shall be by law provided in other cases.

Ibid.

Party appealing to produce copies at the appellate court; and to enter his appeal, etc.

And if he shall fail in the prosecution of his appeal, or in any of the particulars before mentioned, his recognizance shall be forfeited; and the supreme judicial court shall award such sentence against him for the offence, whereof he is charged, as they ought to do in case he stood convicted by verdict of a jury in said court; and may grant a *capias* to bring him into court to receive such sentence.

Ibid.

On failure of prosecuting his appeal, his recognizance to be forfeited.

Sentence in such case.

*Capias*.

4. That the said court of sessions shall have power to adjourn the same, from time to time, as may be necessary for the public good; and to appoint a clerk to attend said court, and to record the proceedings thereof; which clerk shall be duly sworn to the performance of the duties of his office; and shall hold the same during the pleasure of the court.

Ibid.

The court empowered to adjourn; and to appoint a clerk.

But by statute 1803, c. 155, s. 3. a large portion of the jurisdiction of this court was transferred to the common pleas. This statute enacts, that the courts of common pleas shall have, exercise, and perform all the powers, authorities, and duties, which before and until the passing of the act, the respective courts of sessions, within the several counties in this commonwealth by law had, exercised, and performed, except as to erecting and repairing gaols, and other county buildings, allowing and settling county accounts, estimating, apportioning, and

Jurisdiction transferred to the common pleas.

issuing warrants for assessing county taxes, granting licenses, and laying out, altering, and discontinuing highways and town ways, and appointing committees, and ordering juries for that purpose.

The sessions newly organized.

Afterwards by an act passed June 19, 1807, (entitled "*an act in addition to an act, 'entitled an act establishing courts of general sessions of the peace,' passed July 30, A. D. 1782*") the court of sessions was newly organized.

By this act of 1807, the sessions' were there afterwards to consist of one first or chief justice, and two, four, or six associate justices, according to the county in which it was holden: thus, in *Suffolk*, there were four, and in *Essex*, six. These justices were appointed by the governor and council, and received three dollars per day, each, for their services; and two dollars for every ten miles travel.

The business of this court transferred to the justices of the common pleas.

But it is of little consequence to notice this last act particularly; inasmuch as it is repealed by a recent statute, which transfers *all* the business of the sessions to the justices of the common pleas in the several counties.

TITLE CXXXVI.

SETTLEMENT OF PAUPERS.

1. **O**f settlement by reason of residence.
2. Of settlement by reason of the payment of taxes.
3. Of settlement by reason of property.
4. Of settlement by reason of office.
5. Of settlement by reason of apprenticeship and carrying on a trade.
6. Of derivative settlements; or settlements in right of the husband, or the parent.
7. Of the settlement of slaves.
8. How settlements are obtained or varied, by incorporations or divisions of towns and districts.
9. In what cases a town is estopped from contesting the settlement of a pauper.

I. Of settlement by reason of residence.(1)

By statute 4 W. & M. c. 13,(2) if any person or persons come to sojourn or dwell in any town, or precinct thereof, and be there received and entertained by the space of three months, not having been warned by the constable, or other person whom the selectmen shall appoint, for that person to leave the place, and the names of such persons, with the time of their abode there, and when such warning was given them, returned unto the quarter sessions; every such person shall be reputed an inhabitant of such town, or precinct of the same; and the proper charge of the same, in case through sickness,

Three months residence without being warned to depart.

(1) For further information on this subject, See title PAUPERS.

(2) Passed, A. D. 1692.

lameness, or otherwise, they come to stand in need of relief, (unless the relations be of sufficient ability, &c.)

3 Vol. Laws, Thomas's  
Ed. Append. p. 162.

Twelve months resi-  
dent &c., without warn-  
ing, or obtaining the  
approbation of the  
selectmen.

By statute 12 & 13 W. 3, c. 10,(3) no person whatsoever coming to reside or dwell in any town, (other than freeholders or proprietors of land in such town, or those born, or that have served an apprenticeship there, and have not removed and become inhabitants elsewhere,) shall be admitted to the privilege of elections in such town, (though otherwise qualified,) unless such person shall first make known his desire to the selectmen thereof, and obtain their approbation of the town for his dwelling there.

Nor shall any town be obliged to be at charge for the relief and support of any person residing in such town, (in case he or she stand in need,) that are not approved as aforesaid; unless such person or persons have continued their residence there, by the space of twelve months next before, and have not been warned in manner as the law directs, to depart and leave the town.(4)

(3) Passed, A. D. 1760.

(4) A mariner making his home, in any town, for more than a year, and following the business of his profession therefrom, acquired a settlement in such town, by force of this statute.

Abington v. Boston, 4 Mass. Rep. 315.

When a man has come to sojourn and dwell in any town, and he has been warned, and a return has been duly made within the year, he cannot gain a settlement by continuing his residence there any length of time whatever; nor perhaps by returning after a temporary absence too short to enable him to gain a settlement by residence elsewhere; for his domicile may be considered as remaining, and it may be reasonably supposed that he absented himself with the intention of returning.

But if, after the warning, he remove from the town, without an intention of returning, continuing absent long enough to gain a new settlement by residence, and, afterwards, come back and dwell in the town he had been warned to leave, he must be again warned within the year, for he now also comes to sojourn and dwell there: and if he be not so warned, by living there a year he will gain a new settlement.

By statute 13 Geo. 2, c. 1, s. 1,(5) no town shall be obliged to be at charge for the support of any person resident in such town, that hath not continued there so long as to become an inhabitant, unless he have obtained the approbation of the town, (at a meeting of the inhabitants regularly assembled,) or the approbation of the selectmen (at their meeting,) for his dwelling there: such approbation of the selectmen to be given in writing, under their hands, or under the hands of the major part of them. And no act of the selectmen, in rating or assessing any such person unto any charges whatsoever, shall subject such person to any expenses for his support.

3 Vol. Laws, Thomas's  
Ed. Append p. 191.

The approbation of  
the town, or of the  
selectmen thereof.

By statute 7 Geo. 3, c. 1, s. 4,(6) from and after the tenth day of April, then next, no person whatsoever coming to reside or dwell within any town, shall gain an inhabitancy in such town, by any length of time he or she may continue there without warning,(7) unless such person shall first have made known his or her desire to the selectmen thereof, and obtained the approbation of the town, at a general meeting of the inhabitants, for his dwelling there; nor shall any town be obliged to be at charge for the relief and support of any person residing in such town, (in case he or she stand in need,) that have not been approved as aforesaid.

Ibid. 192.

Settlement not ac-  
quired by residence.

Approbation of the  
town necessary.

This distinction comports with the words of the statute: for a man may come to sojourn and dwell in the same town, in which he formerly had his domicile; and it is consistent with the intent of the statute to give the town another option, whether it will or will not, receive the sojourner as an inhabitant. When he first came, he might be without property; and when sick, chargeable to the town: but when he shall come into the town again, he may have a large estate, and may be a valuable acquisition to the town as an inhabitant.

*Chelsea v. Malden*, 4 Mass. Rep. 134.

(5) Passed, A. D. 1739.

(6) Passed, A. D. 1767.

(7) This section extends only to persons, who were competent to gain a settlement by residence if not warned out.

*Winchendon v. Hatfield*, 4 Mass. Rep. 129.

Residence without  
warning; or admis-  
sion by the town.

By statute 1789, c. 14, s. 1,(8) all persons, citizens of this commonwealth, who, before the tenth day of April, in the year of our Lord, one thousand seven hundred and sixty-seven, resided or dwelt within any town or district in the then *Province of the Massachusetts Bay*, for the space of one year, not having been warned to depart therefrom, according to law; or who, since the same tenth day of April, have obtained the approbation of the town or district, at a general meeting of the inhabitants for his dwelling there; and have not afterwards gained a settlement elsewhere, in this, or some other of the United States; or who, after having arrived at the age of twenty-one years, shall reside in such town or district, two years successively, without being warned, as prescribed by the act, shall be deemed and taken to be inhabitants of the same town and district, to every intent and purpose whatever.

Mode of warning.

By the same statute, s. 6, the method of warning a person to depart from any town or district, shall be in writing, under the hands and seals of the selectmen, or the major part of them, in substance as prescribed by the act.

Mode of serving the  
precept.

And the mode of service shall be by reading or delivering a copy of the precept to the person ordered to depart, or by leaving a copy of such precept, at his or her last and usual place of abode. And it shall be the duty of the town or district clerk to make a record of the warrant, and the return of the constable made thereon, in the town book.

What descriptions of  
person cannot gain a  
settlement by resi-  
dence.

Again: by the same statute, s. 3, no person committed to prison, or lawfully detained in any town or district, or who shall come or be sent for nursing, education, or support, or to learn any trade or mystery, or who shall come or be sent to any physician or surgeon, to be cured of any disorder, shall, by remaining in such town or district, for any length of time, in consequence thereof, obtain a settlement therein.

(8) Passed June 23, 1789.

By an additional act, 1790, c. 41, passed March 9, 1791, it is provided, that no person shall be deemed or taken to be an inhabitant of any town or district, by virtue of residence therein, unless he or she shall have resided in the same for the space of three full years, (from the time of the passage of the first act, viz. June 23, 1789,) without being warned to depart.

Time of warning extended.

By an act, in further addition, 1791, c. 45, passed March 6, 1792, no person shall be deemed or taken to be an inhabitant of any town or district, by virtue of residence therein, unless he or she shall have resided in the same, for the space of four years, from the time of passing the first act, (viz. June 23, 1789,) without being warned to depart.

Time of warning further extended.

By an act, in still further addition, 1792, c. 69, passed March 22, 1793, no person shall be deemed or taken to be an inhabitant of any town or district, by virtue of residence therein, unless he or she shall have resided in the same, for the space of five years, from the time of passing the first act, (viz. June 23, 1789,) without being warned to depart.

Time of warning still further extended.

By the last statute of settlements, 1793, c. 34, s. 2, a. 8, passed February 11, 1794, any person that shall be admitted an inhabitant by any town or district, at any legal meeting, in the warrant for which an article shall be inserted for that purpose, shall thereby gain a legal settlement therein.

Persons admitted inhabitants.

## II. Of settlement by reason of the payment of taxes.

By the statute, 1789, c. 14, s. 1, every person, being a citizen of the commonwealth, who, after the age of twenty-one years, shall reside and pay a town tax, for the term of five years successively, shall be an inhabitant of the same town or district: (9)

(9) The statute of 1789, was repealed by the statute of 1793. And as the former was passed, June 23, 1789, and the latter, Fe-

## SETTLEMENT OF PAUPERS.

By the last statute of settlements, 1793, c. 34, s. 2, a. 12, any person being a citizen of this, or of any other of the United States, and of the age of twenty-one years, who shall thereafter reside in any town or district within the commonwealth, for the space of ten years together, and pay all state, county, town, or district taxes, duly assessed on such person's poll or estate, for any five years within said time, shall thereby gain a settlement in such town or district.

III. Of settlement by reason of property.

By the statute, 1789, c. 14, s. 1, every person being a citizen of the commonwealth, who shall be seized of an estate of freehold, in any particular town or district, of the clear annual income of *three pounds*, and shall reside thereon, or within the same town or district, occupying and improving the same in person, for the space of two whole years, shall be an inhabitant of such town or district. (10)

By statute, 1793, c. 34, s. 2, a. 4, any person of twenty-one years of age, being a citizen of this or any of the United States, having an estate of inheritance or freehold in the town or district where he dwells and has his home, of the clear yearly income of *three pounds*, and taking the rents and profits thereof three years successively, whether he lives thereupon or not, shall thereby gain a settlement therein.

By the same statute, and section thereof, art. 5, any person of twenty-one years of age, being a citizen of this or any of the United States, having an estate the princi-

pal part of which he occupies, on or before the first of January 11, 1794, the former was not in force *five* years; so that under it a pauper could not acquire a settlement by residence and payment of taxes. See *Windham v. Portland*, 4 Mass. Rep. 388.

(10) A freehold, in right of the *wife* is within the statute. The husband is in fact *seized* of it, and is entitled to all the rents and profits: and the statute does not require that the freehold should be holden by the pauper in his *own* right. *Ibid.* 387.

pal of which shall be set at *sixty pounds*, or the income of *three pounds twelve shillings*, in the valuation of estates made by the assessors, and being assessed for the same, to state, county, town, or district taxes, for the space of five years successively, in the town or district where he dwells and has his home, shall thereby gain a settlement therein.

#### IV. Of settlement by reason of office.

By statute, 1793, c. 34, s. 2, a. 6, any person being chosen and actually serving one whole year, in the office of clerk, treasurer, selectman, overseer of the poor, assessor, constable, or collector of taxes, in any town or district, shall thereby gain a settlement therein.

So by the same statute, s. 2, a. 7, all settled ordained ministers of the gospel, shall be deemed as legally settled in the towns or districts, wherein they are or may be settled and ordained.

#### V. Of settlement by reason of apprenticeship and carrying on a trade.

By the statute of 1793, c. 34, s. 2, a. 11, any minor who shall serve an apprenticeship to any lawful trade, for the space of four years, in any town or district, and actually set up the same therein, within one year after the expiration of said term, being then twenty-one years old, and continue to carry on the same for the space of five years therein, shall thereby gain a settlement in such town or district. But such person, being hired as a journeyman, shall not be considered as setting up a trade.

#### VI. Of derivative settlements; or settlements in right of the husband, or the parent.

By statute, 1789, c. 14, s. 3, every woman, by inter-  
marrying with an inhabitant of any town or district, shall, Settlements by marriage. be deemed and taken to be an inhabitant of the same town or district with her husband.

## SETTLEMENT OF PAUPERS.

By statute, 1793, c. 34, s. 2, a. 1, a married woman shall always follow and have the settlement of her husband, if he have any within the commonwealth; otherwise her own, at the time of the marriage, if she then had any, shall not be lost or suspended at the time of the marriage. And, in case the wife shall be removed to her settlement, and the husband shall want relief from the state, he shall receive it in the town where the wife shall have her settlement, at the expense of the commonwealth.

Settlements by birth.

By statute, 1789, c. 35, s. 3, children born in wedlock, at the time of their birth, and afterwards, shall be deemed and taken as inhabitants of the same town or district with their parents: and children, otherwise born, shall be deemed and taken to be inhabitants with the mother, until they shall have obtained a legal settlement or habitation in some other town or district.

By statute, 1793, c. 34, s. 2, a. 2, legitimate children shall follow and have the settlement of their father, if he shall have any within this commonwealth, until they gain a settlement of their own; (11) but if they shall have none,

(11) If these words are taken literally, then a son of full age, who had left his father, and had become the head and father of his own family, if he had gained no new settlement, would follow any new settlement acquired by his father, after the son had left him: but this could never have been the intention of the legislature. The object of this provision was to regulate the derivative settlement of legitimate children, who, when emancipated, are no longer in a condition to derive a settlement from their father.

Wives and children may have derivative settlements; because the husband and father have the legal control of their persons, and the right to their services: and the wife cannot be separated from the husband, nor minor children from the father. Upon the same principle, slaves, when slavery was tolerated, had a derivative settlement with their master.

But when a father ceases to have any control over his children, or any right to their service, it is not easy to devise any good reason why they should not be emancipated, and as no longer having a derivative settlement with the father, on his acquiring a new set-

they shall follow and have the settlement of their mother, if she shall have any.

By the same statute, s. 2, s. 3, illegitimate children shall have and follow the settlement of their mother, at the time of birth, if any she shall then have within the commonwealth. But neither legitimate nor illegitimate children shall gain a settlement by birth, in the places where they may be born, if neither of their parents shall then have any settlement there.

#### VII. Of the settlement of slaves.

A slave, while such, could never acquire a settlement, in his own right. But he might, through age or disease, become useless, when the property of a master who was himself a pauper. In this case, his maintenance would devolve on some town, and some settlement must be assigned to him, to designate the town subject to the burden. He had, consequently, a derivative settlement from his master: and whenever the master acquired a new settlement, it was accompanied by the settlement of the slave, who could not be separated from his master.

Per Parsons, C. J. in delivering the opinion of the court, in *Winchendon v. Hatfield*, 4 Mass. Rep. 129.

Slaves were not within the 9 & 10 sections of the statute of 4 W. & M. or the 12 & 13 W. 3, c. 10, making the warning out of persons within the year necessary to make a settlement; nor within the statutes of 10 Geo. 2, c. 3, and 13 Geo. 2, c. 1, which direct every inhabitant of a town receiving an inmate, boarder, or tenant, to give

*Ibid.*

dement: and when the reason ceases, the law, founded on that reason, ceases.

Upon the father's gaining a new settlement, a child, voluntary living with him, does not have the new settlement with his father, but his former settlement remains.

There are cases, in the English reports, where a child of full age living with his father is considered as not emancipated. In those cases, the child may be considered as a servant, and in that country a settlement may be acquired by service; but, by our laws no settlement can be gained by service.

*Springfield v. Wilbraham*, 4 Mass. Rep. 496.

notice to the selectmen. Neither are slaves within the fourth section of the statute of 7 Geo. 3, c. 3, which provides that no settlement shall be gained by residence; as that section extends only to persons, who were competent to gain a settlement by residence, if not warned out.

*Id.*

A practice was prevailing to manumit aged or infirm slaves, to relieve the master from the charge of supporting them. To prevent this practice, the statute of 2 Ann. c. 2, was passed. The design of it was to hold the master answerable for the maintenance of the slave, if the manumission was without indemnity. As slaves were rarely, if ever, manumitted, until after a long course of service; probably, it never happened that they acquired their liberty, until after a year's residence in the town, in which they were manumitted. And when they became free, they might gain a settlement in their own right, by a year's residence, unless warned. The town wherein they were manumitted, was the proper town to be indemnified; for *there* only could they acquire a settlement against the will of the inhabitants, as, having lived there a year, they could not be the subject of warning.

VIII. How settlements are obtained or varied, by incorporations or divisions of towns and districts.

By the statute, 1793, c. 34, s. 2, a. 9, all persons, citizens of this state, or of any other of the United States, dwelling and having their homes in any unincorporated place, at the time when the same shall be incorporated into a town or district, shall thereby gain a legal settlement therein.<sup>(12)</sup>

(12) Where the territory of which a new town is composed, was, before the incorporation, an unincorporated place, the incorporation, *ipso facto*, gives every one, inhabiting there, a legal settlement. But where the new town is formed from part of an ancient one, those settled in that place, at the date of the incorporation, are legally settled in the ancient town.

*Bath v. Bowdoin*, 4 Mass. Rep. 452.

By the same statute, s. 2, a. 10, upon division of towns and districts,(13) every person, having a legal settlement

(13) A town is justly considered as under a legal obligation to support every person having a settlement there, when he shall be poor and stand in need of relief, having no relatives obliged to maintain him. And by a separation of a part of its territory and inhabitants, by annexation or a new incorporation, this obligation remains unaltered.

But as this separation must be made by the legislature, the act authorizing it, may impose conditions or limitations to relieve the town, which is to be deprived of a part of its territory or inhabitants: and provisions of this nature are frequently, although not always introduced into acts incorporating a new town, composed of the fragments of one or more old towns. But if no legislative provision be made, the settlement of any person in the old town is not affected by the new incorporation, unless, at the time of the incorporation, he shall dwell within the limits of it. This principle, deduced from the nature of corporate rights and duties, has been frequently recognized by the legislature, when passing acts incorporating new towns out of one or more old towns. Per Parsons, C. J. in delivering the opinion of the court in *Windham v. Portland*, 4 Mass. Rep. 389, 390.

When an act, incorporating part of a town, and erecting it into a new town, provides that all the debts due to or from the original town, shall be divided between the two towns, in proportion to the state valuation; and that the poor, with which the original town was then chargeable, together with those removed therefrom, and afterwards returning for support, shall be divided in the same proportion; the legal construction of such a provision is, that the debts are to be paid to or by the original town, who may be compelled by the new town to pay over to it, its proportion of debts received, and may compel such new town to reimburse its proportion of debts paid; and that the *charges of maintaining* the poor, and not the *persons* of the poor, are to be divided: each town having a remedy against the other for the reimbursement of any excess of such charges beyond its due proportion.

*Brewster v. Harwick*, 4 Mass. Rep. 278.

So where a new town A, was incorporated out of part of an old town B, and the act of incorporation provided that A, should pay to B a sum of money, as a consideration for being exempted from any expense on account of paupers belonging to B previous to the incorporation, except such as might thereafter be returned as pau-

## SETTLEMENT OF PAUPERS.

therein, but being removed therefrom at the time of such division, and not having gained a legal settlement elsewhere, shall have his legal settlement in that town or district, wherein his former dwelling place or home shall happen to fall, upon such division. (14)

And when any new town or district shall be incorporated, composed of a part of one or more old incorporated towns or districts, all persons legally settled in the town or towns, district or districts, of which such new town or district is so composed, and who shall actually dwell and have their homes within the bounds of such new town or district, at the time of its incorporation, shall thereby gain a legal settlement in such new town or district. (15)

*Provided nevertheless*, that no person residing in that part of any town or district, which upon such division, shall be incorporated into a new town or district, having then no legal settlement therein, shall gain any by force of such incorporation only : nor shall such incorporation prevent his gaining a settlement therein within the time and by the means by which he would have gained it there, if no such division had been made.

pers from some other town, and who were born in, or formerly were inhabitants of that part of B which constituted A ; it was held that the paupers returned to B, and not born in A, for whose support A must pay, were those who, *when* they removed to other towns, removed from that part of B forming A, and not such as might have *once* lived in A, not being born there, but, before they dwelt in another town, removed and lived in B, whence they in fact emigrated.

Salem v. Hamilton, 4 Mass. Rep. 676.

(14) The dwelling place must mean that from which he removed.

Ibid. 679.

(15) When an old town is divided into two towns, all the inhabitants, at the time of the incorporation, having settlements there, become settled in the towns, respectively, within which they lived at the time of the incorporation : and an inhabitant not settled there, gains no new settlement by the incorporation.

West-Spring. v. Granville, 4 Mass. Rep. 487.

IX. In what cases a town is estopped from contesting the settlement of a pauper.

By statute, 1793, c. 59, there are three methods by which the place of a pauper's settlement may be determined; and a determination of it, either way, will conclude the towns who are parties to it. See Leicester v. Rehoboth,  
4 Mass. Rep. 181.

One method, established by s. 10 & 11 of the act, is by judgment upon a complaint filed before a justice of the peace. (16) Ibid.

Another method by sec. 9, of the act, is by judgment in an action against the town, in which his settlement is alleged in the writ. (17) Ibid.

The third method is provided by sec. 12, of the same act. By this section, when the overseers of any town, having been at the expense of supporting a pauper, shall send a written notification to the overseers of the town, where his settlement is supposed to be, stating the facts relating to such pauper, and requesting his removal. If such removal be not effected nor objected to within two months after such notice given, (18) then the overseers giving notice, may remove the pauper to the town where his settlement is supposed, *the overseers whereof shall be obliged to receive and provide for him*: (19) and their town Ibid.

(16) See title PAUPERS, page 969.

(17) See Ibid.

(18) In *Bridgewater v. Dartmouth*, 4 Mass. Rep. 273, the answer to the notice of the selectmen purported to be from the selectmen of Dartmouth, but was signed by one of them only. To this, an objection was taken by the plaintiffs: but Per Cur.—“This we consider as a subscription in *behalf* of the selectmen. The statute requires the objection to be in writing; but does not require it to be signed by the greater number of the selectmen: and the defendants in this action consider the written objection as the act of their selectmen.”

(19) In *Leicester v. Rehoboth*, the latter gave no answer to the notice of the former; but afterwards, *Rehoboth* paid *Leicester* all the expenses incurred by the latter in the support of the pauper previous to the notice, and for more than two months subsequent

shall be liable for the expenses of his support and removal, to be recovered by action, in which the settlement of the pauper shall not be contested.(20)

thereto : but the pauper was never removed. Per Cur. "If when the removal was not objected to in two months, the plaintiffs had, in fact, removed the pauper to *Rehoboth*, the defendants could not then have denied the settlement of the pauper to be in their town. Or if *Leicester* had not removed the pauper, but had, without or after the removal, commenced an action against *Rehoboth*, to recover the expenses of supporting the pauper, and had recovered judgment, this judgment would have concluded *Rehoboth*. But, in the present case, *Leicester* did not remove the pauper, and *Rehoboth* paid the demands of *Leicester* voluntarily, and without an action. We do not therefore consider *Rehoboth* as concluded from denying that the pauper's settlement is with them."

(20) See title PAUPERS, page 969.

TITLE CXXXVII.

SHERIFF.

1. **O**F the appointment of sheriffs.
2. Of the security required of sheriffs.
3. Penalty for neglecting to give such security.
4. Of the general power, duty, and liability of sheriffs.
5. Penalty where a sheriff neglects to pay over money collected on execution.
6. Duty of sheriffs to pay fines and bills of costs, by them received, into the treasury; and the penalty for neglect of such duty.
7. Of the power and liability of sheriffs, after removal from office.
8. Proceedings in suits on sheriffs' bonds.

I. Of the appointment of sheriffs.

Sheriffs are appointed by the governor and council; during whose pleasure they hold their offices.

Const. c. 2, s. 1, s. 9.

Each person who shall receive a commission, appointing him sheriff of the counties of *Suffolk, Essex, Middlesex, Hampshire, or Worcester*, must, before he takes any of the fees or profits of his office, pay to the treasurer of the county, *forty dollars*: and if appointed for any other county, he must pay as aforesaid the sum of *twenty dollars*. The law likewise obliges him to lodge with the secretary of the commonwealth, the county treasurer's certificate therefor.

Stat. 1795, c. 80, s. 4.

What sum sheriffs must pay to the treasurer, before taking any fees of office.

It is made the duty of every person appointed sheriff of any county, and legally qualified to execute said office, to give notice thereof, as soon as may be, to the respective coroners of the same county.

Stat. 1792, c. 17.

Notice of their appointment to coroners.

## II. Of the security required of sheriffs.

By statute, 1783, c. 44, every sheriff shall give sufficient security, at the discretion of the court of common pleas, in his county, for his faithful performance of the duties of his office, and to answer the malfeasance and misfeasance of all his deputies.

By an additional act, 1794, c. 53, the justices of the several courts of common pleas, are authorized and required, in the term of said court, which shall be held in course, in the several counties, on or next after the last Tuesday of June, annually, to consider of the sufficiency of the security given by the sheriffs, in their respective counties : and in case they shall find and determine the same to be insufficient, they shall cause a record to be made of such determination, by the clerk ; and shall also cause the sheriff, whose security shall be found insufficient, to be served with an attested copy of said record, and shall require him to procure and give new security, to the satisfaction of said justices, on or before the term of the court next following the term in which said insufficiency shall be recorded, as aforesaid.

## III. Penalty for neglecting to give such security.

By the statute of 1783, c. 44, if any sheriff shall neglect to give such security, at the court of common pleas, which shall be held in his county, next after his being commissioned, all services done by him afterwards, and before he shall give such security, shall be null and void.<sup>(1)</sup>

By the additional act, 1794, c. 53, if any sheriff shall neglect to give security as required by the act of 1783, c. 44, or shall neglect to give a new security which may be required by the justices of the court of common pleas, pursuant to the additional act, he shall forfeit and pay to

(1) This clause is repealed by the act of 1794, c. 53, s. 3.

the use of the commonwealth, the sum of *one hundred and fifty dollars*, for each month's neglect, to be recovered by action of debt, in any court proper to try the same; and it shall be the duty of the attorney-general to prosecute for the same.

And the name of such sheriff, neglecting to give or renew his security, as aforesaid, shall be certified by the court of common pleas, in his county, to the governor and council, and also to the attorney-general.

And the governor, with advice of council, shall thereupon remove such sheriff from his office; unless reasonable cause to the satisfaction of the governor and council shall be assigned for said neglect; and unless such sheriff, whose name and neglect shall be certified, as aforesaid, shall give or renew his security, as the case may be, to the satisfaction of the governor and council, within twenty days after the certificate shall be made, as aforesaid.

#### IV. Of the general power, duty, and liability of sheriffs. •

In England, the sheriff is both a judicial and a ministerial officer; but, in this state, his powers and duties are exclusively of a ministerial nature.

The sheriff a ministerial officer only.

The sheriff is the principal conservator of the peace of the county for which he is appointed; and has authority, when necessity requires it, to raise the *posse comitatus*, or power of the county.

Principal conservator of the peace.

By statute, any sheriff, deputy sheriff, or constable, being in the execution of his office, for the preservation of the peace, or for the apprehending or securing any person or persons for breach of the same, or for any other criminal cause, shall have lawful authority to require suitable aid and assistance therein. And if any person being required by any sheriff, deputy sheriff, or constable, in the name of the commonwealth, to aid and assist him in the execution of his office as aforesaid, shall neglect or refuse so to do, and be thereof convicted before any court proper to try the same; such offender shall be

Stat. 1795, c. 68, s. 2.

May command aid in the execution of his office.

Penalty for refusing aid.

fined, to the use of the county where the offence shall be committed, not less than *three dollars*, nor more than *fifty dollars*, according to the circumstances of the case. And if any such offender shall be unable, or shall not, forthwith, pay the said fine, such court may punish him by imprisonment not exceeding thirty days.

March 12, 1808.

May return jurors *de talibus circumstantibus*.

In England, sheriffs have the power of selecting jurors, both grand and petit : but the wisdom and policy of our laws has refused to intrust their discretion, with an authority so dangerous to the liberties of the citizen. However, the sheriff in this state, in causes in which he is not interested may return jurors *de talibus circumstantibus* ; provided there be seven, at the least, of the pannel, returned by the *venire*.

Stat. 1783, c. 44, s. 1.

Keeper of the gaol.

Sheriffs have the custody of gaols. By statute, the sheriff of each county shall have the custody, rule, and charge of the gaol or gaols therein, and of all prisoners within such gaol or gaols, and shall keep the same himself personally, or by his deputy, for whom he shall be answerable.

Stat. 1784, c. 41, s. 2.

Liable for escapes.

The sheriff is liable for escapes from prison, whether the escape happens through negligence, or through the insufficiency of the gaol. But in case the escape happens through the insufficiency of the gaol ; the sessions of the same county are authorized to assess the sum paid by the sheriff, upon the polls and estates of the county, and to order the county treasurer to pay the same over to the sheriff. And if the sessions shall not make such assessment, and if the treasurer shall not pay such sum, within six months next after the demand shall be laid before the sessions ; then the sheriff may bring his action against the inhabitants of such county, to be heard and tried, either in that or one of the next adjoining counties, at his election.(2)

So by statute, the sheriff of each county in this commonwealth shall have power, and it shall be his duty, and

(2) See title ESCAPE, vol. 2, p. 490.

the duty of each of his deputies,(3) to serve and execute, within his county, all writs and precepts to him or them directed and committed, issued from good and lawful authority.(4)

Stat. 1783, c. 44, s. 1.

Power and duty to execute writs.

The act of the deputy is considered in law as the act of his principal: and the principal is, in all cases, liable for the malfeasance and non-feasance of his deputy.(5)

Ibid.

Answerable for deputies.

A sheriff is liable for taking insufficient bail.(6)

Liable for insufficient bail.

So, in certain cases, a sheriff is liable for not attaching property when directed by the creditor ;(7) as well as answerable for the property which he may have attached.(8)

Liable for not attaching property and answerable for property attached.

(3) By statute, 1795, c. 41, no sheriff shall demand or receive from any of his deputies, more than at the rate of twenty-five per cent. on the amount of fees for travel and service.

(4) When a sheriff has arrested a debtor in execution, and committed him to prison, and the debtor afterwards takes the benefit of the poor prisoner's act, the sheriff is entitled to demand and receive his fees of poundage and travel of the judgment creditor.

Boswell v. Dingley, 4 Mass. Rep. 411.

(5) A sheriff is answerable *civiliter*, for the malfeasance or non-feasance of his deputy, in the duties enjoined on them *by law*, but not for the breach of a contract, made with a plaintiff to do, what by law, they are not obliged to do.

Marshall v. Hosmer, 4 Mass. Rep. 60.

(6) See title BAIL, vol. 1, p. 219.

If a creditor indorses, on an original writ, a direction to the officer, to attach sufficient estate of the debtor, or hold him to bail; it seems that the officer has an election to execute the writ in either way.

Ibid.

(7) If a creditor, (notwithstanding a direction to the officer, indorsed on the writ, to *attach sufficient property, or hold to bail,*) on delivering the writ, gives verbal orders to the officer to attach certain specified property, he is bound to conform to such orders: and in such case the creditor is not bound to go with the officer, making the attachment: but if he direct goods to be attached, not in the possession of the debtor, or about which there is a dispute, he must give the officer an indemnity.

Ibid.

(8) In an action against a sheriff, for not seizing, upon execution, chattels which he had attached on the original writ, it is a good de-

2 Rep. Dig. 300.

Liable for a false return.

Stat. 1783, c. 44, s. 3.

Sheriff prohibited from acting in the capacity of attorney.

So a sheriff is liable for a false return.(9)

By statute, no sheriff, or deputy sheriff, shall be suffered to appear in any court, or before any justice of the peace as attorney to, or in behalf of, or assisting, or advising to any party in a suit : nor shall any sheriff or his deputy, be allowed to draw, make, or fill up, any plaint, declaration, writ, or process ; or to draw or make any plea for any other person : but all such acts done by either of them are void.

V. Penalty where a sheriff neglects to pay over money collected on execution.

Rid. s. 4.

By statute, if any sheriff, or his deputy, shall unreasonably neglect or refuse to pay to any person, any money received by him, upon execution, to the use of such person, upon demand thereof being made, he shall forfeit and pay to such person five times the lawful interest of such money, so long as he shall so unreasonably detain the same after such demand is made.(10)

VI. Duty of sheriffs to pay fines and bills of costs, by them received, into the treasury ; and the penalty for neglect of such duty.

Stat. 1791, c. 53, s. 3.

Fines, etc. collected to be paid into the treasury.

By statute, all sheriffs, coroners, and constables, who may receive any fines, forfeitures, or bills of costs in pursuance of a judgment or sentence of the supreme judicial court, or court of sessions, as well where such fines and forfeitures accrue to the commonwealth, as where they accrue to the county, (except debts and costs received upon executions in favour of the commonwealth) shall,

fence that such chattels were the property of strangers, and not of the debtor.

Fuller v. Holden, 4 Mass. Rep. 498.

(9) If a sheriff sell goods upon execution, without legally advertising the sale, he is liable in an action of the case, for a false return.

Livermore v. Bagley, 3 Mass. Rep. 487.

(10) A sheriff having an execution in his hands, and the return day being passed, the creditor's attorney writes to the sheriff, pre-

forthwith pay, the same to the treasurer of the county, in which they shall be received. (11)

And if any sheriff, or other officer, receiving such fine or forfeiture, or bills of costs, shall neglect to pay the same, for the space of ten days after receipt thereof, he shall forfeit and pay double the amount of such fine or forfeiture, and bill of cost, to such county treasurer; who is empowered and directed to sue for the same forthwith, to be recovered with costs, by action of debt, in the court of common pleas, in the same county; one third of said penalty to the use of such county treasurer, the other two thirds to the use of the commonwealth; and the same when recovered and received, (if the fine or forfeiture unpaid, accrue to the commonwealth,) shall, together with all other fines, forfeitures, and costs accruing to the commonwealth, by him received as above, be applied to the payment of bills of costs taxed in the supreme judicial court, and certified to him as aforesaid.

Ibid.

Forfeiture for neglect.

How recoverable.

How the forfeiture shall be appropriated.

And if any sheriff, or other officer aforesaid, or any gaoler, shall permit any person, who may be sentenced to pay any fine, forfeiture, or bill of cost, and committed to the custody of such sheriff, or other officer or gaoler, till such sentence be performed, to go at large, without and before payment, unless by order of law, and shall not pay such fine, forfeiture, and costs, to the county treasurer, within twenty days next after such escape; he shall be held to pay double the sum of such fines, forfei-

Ibid.

Liability of sheriff, etc. who permit a prisoner to escape before payment of his fine, etc.

suming him to have the money, and requests him to send it to him by mail. At that time the sheriff had not received the money. Several months after, he received it, and put it in the post-office, directed to the creditor's attorney, to whom it was never delivered. In an action against the sheriff, it was held that the money, so sent, was sent at his own risk; although if he had sent it on receiving the attorney's letter, it would have been at the risk of the creditor.

Wakefield v. Lithgow, 3 Mass. Rep. 249.

(11) The student will bear in remembrance that the criminal jurisdiction of the sessions is now transferred to the common pleas.

tures, and costs : and the treasurer of the county shall have power to sue for and recover the same, in the same manner, and to the same uses as is before provided, where such sheriff or other officers neglect to pay such fines, forfeitures, and costs as they have actually received.

*Ibid.*

*Sheriff, etc. to exhibit certificates of the treasurer of the payment of fines, etc.*

And every sheriff, and other officer aforementioned, shall, (instead of having his accounts of fines, received and paid, audited by the said courts,) be held to produce to said courts respectively, at every session thereof in their county, receipts in full, from the county treasurer, for all fines, forfeitures, and costs, imposed by said courts respectively, received and paid, previous to the sitting of such courts; or to assign the cause why they have not received, or not paid the same, in order that such court may order a prosecution against such as shall appear to be delinquent.

VII. Of the power and liability of sheriffs, after removal from office.

*Stat. 1783, c. 44, s. 4.*

All sheriffs, when removed from office, as well as their deputies, shall have power to execute all such precepts as may be in their hands at the time of their removal from office.

*Ibid.*

And such sheriff shall be held answerable for the delivery over to their respective successors, of all prisoners which may be in their custody, at the time of their removal, and for that intent shall still retain the keeping of the gaol or gaols in their respective counties, and the prisoners therein, until their successors shall be appointed and qualified as the law directs.

VIII. Proceedings in suits on sheriffs' bonds.

*Stat. 1805, c. 99, s. 1.*

*Remedy of injured individuals on the bond.*

By statute, when the condition of any bond, which may be given to the treasurer of the commonwealth by any sheriff, for the faithful performance of the duties of his office, and to answer for the malfeasance and misfeasance

of all his deputies, shall be broken, to the injury of any person, such person may cause a suit to be instituted upon such bond, at his own cost, but in the name of the treasurer, and the like indorsements shall be made on the writ, and the like proceedings be had thereon to final judgment and execution, as may be made and had by a creditor or administration bonds given to any judge of probate.

*Provided however*, that no such suit shall be instituted by any person, for his own use, until such person shall have recovered judgment against the sheriff, his executors or administrators, in an action brought for the malfeasance or misfeasance of the sheriff or his deputy, in that capacity, or a decree of a judge of probate, allowing a claim for any of the causes aforesaid: and such judgment or decree, or so much thereof as shall be unsatisfied, with the interest due thereon, shall be the portion of the penalty for which execution shall be awarded.

*Ibid.*

A suit on the bond will not lie till after judgment recovered for a malfeasance or a misfeasance.

By the same statute it is further provided, that actions for the malfeasance or misfeasance of the sheriff, or any of his deputies, may be sued against the executors or administrators of the sheriff, in the same manner as if the cause of such action survived against the executor or administrator at common law. (12) *Provided however*, that the act shall not be construed to make any surety in any bond, given by the sheriff, before the passing of the act, liable to any suit, which could not, theretofore, be legally prosecuted against him.

*Ibid.* s. 2.

Executors, etc. of sheriffs may be sued for a malfeasance, etc. of the sheriff.

Bonds given before the passage of the act, not within it.

Furthermore, by the same statute, it shall be the duty of the treasurer to deliver an attested copy of any sheriff's bond to any person applying and paying for the same: and such attested copy shall be received as evidence in any case: *Provided nevertheless*, that if in any suit, the execution of the bond shall be disputed, the court may

*Ibid.* s. 3.

Persons entitled to a copy of the bond.

The original may be brought into court.

(12) See *Skinner v. Philips & al.* 4 Mass. Rep. 68.

order the treasurer to bring the original bond with him into court.

**NOTE.**—For executions against sheriffs, see title **EXECUTIONS**, vol. 2, p. 520.

By stat. 1783, c. 44, s. 4, no sheriff shall have his body arrested on mesne process, or upon execution, until after removal. See *ante*, vol. 2, p. 520.

TITLE CXXXVIII.

SLANDER.

SLANDER is the defaming a man in his reputation, by speaking or writing words, from whence any injury in character or property arises, or may arise, to him of whom the words are spoken. <sup>2 Esp. Dig. 236.</sup>

Slander may be committed, 1. by *words*; 2. by *writing*; <sup>Ibid.</sup> which is called libel *in scriptis*; 3. by *pictures*, or representations; which is called libel *sine scriptis*.

Slander, by libel, having already been noticed under a former title, (1) I shall, in this place, confine myself to the consideration of slander by words.

Words are either actionable *in themselves*, or become so, by reason of some *special damage* arising from them. <sup>Ibid.</sup>

1. Of words, in themselves, actionable.
2. Of words which become actionable, by reason of some special damage having resulted from them.
3. What circumstances will excuse the speaking of the words.
4. What circumstance will justify the speaking of the words.
5. The construction of slanderous words.
6. Of the declaration; and herein of the nature and office of the innuendo.
7. The pleadings.
8. The evidence.

I. Of words, in themselves, actionable.

Words, in themselves actionable, are such as may either endanger a person in law, by impeaching him of <sup>3 Bl. Com. 121.</sup>

(1) See Title LIBEL.

some heinous crime, as to say that a man hath poisoned another, or is perjured; or which exclude him from society, as to charge him with having an infectious disease; or which may impair or hurt his trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave.

Selw. 1058.

For slander of this kind an action may be brought before any injury has been sustained, in consequence of the words having been spoken. From the nature of the words the law implies the injury; hence such words are said to be actionable in themselves.

II. Of words which become actionable, by reason of some special damage having resulted from them.

Ibid. 1059.

Words not actionable in themselves, may become so by reason of some special damage arising from them, e. g. if a person say to a woman, "thou art a whore," whereby she loses her marriage.

Ibid.

But in these cases it is incumbent on the party injured not only to state and prove the speaking of the words, but also the particular injury which he has sustained; because the words not being actionable in themselves, the special damage is considered as the gist of the action.

Ibid.

It must also appear, that the special damage was the *legal* and natural consequence of the words spoken; for an illegal consequence, viz. a tortious act, will not be sufficient.

III. What circumstances will excuse the speaking of the words.

2 Esp. Dig. 237.

Words, in themselves actionable, may, nevertheless, not bear an action, from the particular circumstances under which they are spoken or used.

Ibid.

As if words are spoken out of a motive of friendship, and without an intention to defame.

Ibid.  
Cites *Hervey v. Bowson*,

As where the action was for saying of the plaintiff, who was a tradesman, "He cannot stand it long, he will

be a bankrupt soon," and special damage was laid in the declaration, viz. "That one *Lane* refused to trust the plaintiff for an horse." *Lane*, the person named in the declaration, was the only witness called for the plaintiff, and it appearing from his evidence, that the words were *not spoken maliciously*, but in confidence and *out of friendship* to *Lane*, and only by way of friendly warning not to trust the plaintiff for the horse. *Pratt*, C. J. directed the jury, that though the words were actionable, yet that if they should be of opinion that they were not spoken out of malice, but in the manner before mentioned, that they ought to find the defendant not guilty, and they did so accordingly.

Sitt. after Trin.  
5 G. 3.  
Bull. N. P. 2.

Or if they are spoken *privately and in confidence*.

As where a servant brought an action against her former mistress, for saying to a person who came to inquire her character, "That she was saucy and impertinent, and often lay out of her own bed, but that she was a clean girl, and did her work well:" though the plaintiff proved that she was by this means prevented from getting a place, yet *per Lord Mansfield*, "this is not to be considered as an action in the common way for defamation by words, but *the gist of it must be malice*, which is not implied from the occasion of speaking, but should be directly proved. *This was a confidential declaration*, and ought not to have been disclosed."

Bull. N. P. 2.  
3 Esp. Dig. 238.

If the words have been used in the course of legal proceedings, no action will lie for them.

Ibid.

IV. What circumstance will justify the speaking of the words.

If the words be true, the defendant may plead such matter specially, in justification: but it must always be *pleaded*, and cannot be given in evidence under the general issue.

Selw. 1065, 1066.

## V. The construction of slanderous words.

Bull. N. P. 2.

The old rule in the construction of words was, that they were always to be taken in *mitiori sensu*, but this is now exploded, and the rule is, that they shall be taken in that sense in which they would be understood by those who hear and read them.

2 E.p. Dig. 251.

All the sentence is to be taken together, for though part of the words may be actionable, yet they may be so explained by the rest as not to bear an action.

## VI. Of the declaration ; and herein of the nature and office of the innuendo.

Sci.w. 1061.

In the declaration, after such prefatory averments as the circumstances of the case may render necessary, it must be alleged expressly what words were spoken, and that they were spoken and published of the plaintiff falsely and maliciously.

Ibid. 1061, 1069.

Where the charge alleged against the plaintiff relates to his office, profession, or trade, there it ought to appear on the face of the declaration, that plaintiff was in office, or exercising his profession or trade at the time when the words were spoken, and that they were spoken in relation to his office, profession or trade.

Ibid. 1062.

The innuendo.

In that part of the declaration which states the slander, the words ought to be explained in such manner as they may require. Whilst the pleadings were in Latin, this explanation was introduced by the word "innuendo;" e. g. "Thou (*eundem quer' innuendo*) art a thief;" which in a modern declaration would stand thus: "Thou, (meaning the said plaintiff) art a thief." This term *innuendo* is still retained, whenever this part of the declaration is mentioned. In the foregoing instance, it may be observed, that the innuendo is the same in effect as "that is to say." Its office is merely to explain and designate that the person intended by the the word "thou," is the plaintiff. But that the plaintiff was the person in-

tended, must appear from the manner in which the words were spoken, which must be stated in the declaration, namely, that they were spoken of the plaintiff, or to the plaintiff, or in conversation with the plaintiff, and not from the *innuendo* only; for if the person of whom the words were spoken be uncertain, an action will not lie; and a plaintiff cannot merely, by the force of an *innuendo*, apply the words to himself.

When the *innuendo* is annexed to the charge preferred against the plaintiff, then its office is to give to the words spoken their proper signification, but not to extend the sense of them beyond their natural import. Therefore, where a declaration stated, that defendant said of the plaintiff, "he has forsworn himself," (meaning that the plaintiff had committed wilful and corrupt perjury,) it was holden, that the words not being actionable in themselves, because they did not necessarily imply, that the plaintiff had forsworn himself in a *judicial proceeding*, their meaning could not be extended by the *innuendo*. But if the defendant had spoken the words concerning some judicial proceeding that had before taken place, in which the plaintiff had given testimony, and these facts had been averred in the declaration, then such an *innuendo* would have been good; because the words coupled with the preceding facts would have shewn that the defendant meant to charge the plaintiff with perjury punishable by law.

#### VII. The pleadings.

The general issue, in this action, is not guilty.

On the general issue, the defendant will not be allowed to give the truth of the fact imputed to the plaintiff, in evidence, in mitigation of damages. Ibid. 1065.

If, however, the charge be true, the defendant may plead it in justification. Ibid.

So defendant may either plead or (what is more usually done under the general issue) give in evidence the

manner and occasion of speaking the words, to shew that they were not spoken maliciously.

*Ibid.*

As if the words were spoke by the defendant as counsel, and were pertinent to the matter in question.

#### VIII. The evidence.

*Ibid.* 1067.

If the nature of the case requires one or more introductory averments in the declaration, such averments must of course be proved.

*Ibid.*

The words must be proved as laid in the declaration, that is, such of them as will support the action; for it is not necessary for the plaintiff to prove all the words stated in the declaration.

*Ibid.*

If the declaration contain several actionable words, it is sufficient for the plaintiff to prove some of them.

*Ibid.*

Express malice need not be proved; if the charge be false, malice will be implied.

Per Parson, C. J. in delivering the opinion of the court in *Larned v. Buffinton*, 3 Mass. Reps. 55, 552.

The plaintiff may give in evidence, to aggravate the damages, his own rank and condition of life, and also, the defendant may avail himself of such evidence, when it shall have a legal tendency to mitigate the damages; and this may be done either on the general issue, or on a traverse of the justification, because the degree of injury the plaintiff may sustain by the defamation, may very much depend on his rank and condition in society.

*Ibid.* 553.

Evidence of certain facts and circumstances may be received under the general issue, which ought to be rejected under a justification. In the former case, the defendant may prove that the words were spoken through heat or passion, and not from malice; or that they were spoken with an honest intention, through mistake, and not with a design to injure the plaintiff.

*Ibid.*

But if the defendant, when called upon to answer in a court of law, will deliberately declare in his plea that the words are true, he precludes himself from any attempt to mitigate the damages by any of those facts or circum-

stances, because his plea of justification is inconsistent with them.

But there are some facts or circumstances, from which the jury may mitigate the damages under a special justification of the truth of the words, in which he shall fail. <sup>ibid.</sup>

As when, through the fault of the plaintiff the defendant, as well at the time of speaking the words, as when he pleaded his justification, had good cause to believe they were true, the jury may take into consideration this misconduct of the plaintiff to mitigate the damages. (1) <sup>ibid.</sup>

(1) It is actionable to republish any slander invented by another, unless the republication is accompanied by a disclosure of the author's name, and a precise statement of the author's words, so as to enable the party injured to maintain an action against the author. This disclosure and statement must be made at the time of republishing the slander; for it will not avail the defendant to make it for the first time in pleading, to an action brought by the party injured. 2 Sel. 1060, cites *Davis v. Lewis*, 7 T. R. 17. *Maitland v. Goldney*, 2 East 496. *Woolnott v. Meadows*, 5 East 463.



## APPENDIX.

### N<sup>o</sup>. I.

*Record of conviction in case of profane Cursing or Swearing.*

No. I.

ss. BE it remembered, That on the      day of      , in the year of our Lord      , A. B. was convicted before me, Form of conviction. one of the justices of the peace for the county of      , of swearing one (or more) profane oath (or oaths) or of uttering one (or more) profane curse (or curses) as the case shall be. Given under my hand, the day and year aforesaid.

### N<sup>o</sup>. II.

*Form of Recognizance before a Justice of the Peace.*

No. II.

KNOW all men that I, C. D. of      in the county of      do owe unto E. F. the sum of      of the lawful money of *Massachusetts*, to be paid to the said E. F. on the      day of      17      Form of the recognizance. and if I shall fail of the payment of the debt aforesaid, by the time aforesaid, I will, and grant, that the said debt shall be levied of my goods and chattels, lands and tenements, and in want thereof, of my body. Dated at      this      day of      in the year of our Lord, 17     

Witness my hand and seal,

ss.

C. D.

Acknowledged the day and year last abovesaid,  
Before A. B. justice of the peace.

### N<sup>o</sup>. III.

*Form of Execution issuing thereon.*

No. III.

THE COMMONWEALTH OF MASSACHUSETTS.

To the sheriff of the county of      his undersheriff or deputy, or either of the constables of the town of      in the said county of      Form.

BECAUSE C. D. of      in the county of      on the      day of      in the year of our Lord 17      before A. B. Esquire, one of the justices of the peace for the said county of      acknowledged that he was indebted to E. F. of      in the county of      in the sum of      which he ought to have paid on the      day of      and      remains unpaid, as it is said:

We command you therefore, that of the goods, chattels, or real estate of the said C. D. within your precinct, you cause to be paid and satisfied unto the said E. F. at the value thereof in money, the

sum last abovesaid, with more for this writ, and thereof also to satisfy yourself your own lawful fees : and for want of goods, chattels, or real estate of the said C. D. to be found within your precinct, to the acceptance of the said E. F. to satisfy the sums aforesaid, and your said fees ; we command you to take the body of the said C. D. and him commit unto our gaol in our county of aforesaid, there to be detained in the said gaol until he pay the full sums abovesaid with your said fees, or that the said C. D. be discharged by the said E. F. the creditor, or otherwise by order of law. Hereof fail not, and make return of this writ, with your doings therein, unto the above-named A. B. within sixty days next coming. Witness the said A. B. at the day of \_\_\_\_\_ in the year of our Lord 17 \_\_\_\_\_ A. B.

No. IV.  


No. IV.

*Form of submission to Referees before a Justice of the Peace.*

Form of the agreement.

Town of A—, in the county of S—, 178  
 KNOW all men, that A. B. of \_\_\_\_\_ in the county of \_\_\_\_\_ [addition] and C. D. of \_\_\_\_\_ in the county of \_\_\_\_\_ [addition] have agreed to submit the demand made by the said A. B. against the said C. D. which is hereunto annexed (and all other demands, as the case may be) to the determination of E. F. G. H. and I. K. the report of whom, or the major part of whom being made as soon as may be to any court of common pleas, to be holden in and for the said county of S—, judgment thereon to be final : and if either of the parties shall neglect to appear before the referees, after proper notice being given them of the time and place appointed by the referees for hearing the parties in this action, the referees shall have power to proceed *ex parte*.  
 A. B.  
 C. D.

Form of the acknowledgment.

S. . ss. 178 Then the above named A. B. and C. D. personally appeared and acknowledged the above instrument by them subscribed to be their free act. Before me,  
 L. M. justice of the peace.

No. V.  


No. V.

*Form of a Writ of Replevin before a Justice of the Peace.*

COMMONWEALTH OF MASSACHUSETTS.

S— ss.  
 (S. L.) To the sheriff of our county of S—, or his deputy, or to either of the constables of the town of B. in said county.

GREETING.

Form of the writ.

WE command you, that you replevy [here insert a description of the beast or beasts impounded,] belonging to P. D. of B. (addition) now distrained or impounded by S. P. of B. (addition) in the common pound in said B. (or in such other place as they may be restrained) and them deliver unto the said P. D. provided the same are not taken and detained upon trean process, warrant of distress, or upon execution, as the property of the said P. D. and summon the said S. P. to appear before J. S. one of our justices of the peace for our said county of S. at his dwelling house in B. on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ of the clock in the \_\_\_\_\_ noon, to answer unto the said P. D. in a plea of replevin. For that the said S. P. on the \_\_\_\_\_ day of \_\_\_\_\_ at a place called A. in B. aforesaid, unlawfully took and impounded

the said , and the same unjustly detained to this day, to the damage of the said *P. D.* as he saith, the sum of *shillings*, as shall then and there appear with other due damages: *Provided* he the said *P. D.* shall give bond with sufficient surety or sureties to the said *S. P.* in the sum of *pounds*, being double the value of the said beasts, to prosecute his said replevin to final judgment, and to pay such damages and costs as the said *S. P.* shall recover against him, and also to return the said in case such shall be the final judgment. And of this writ, with your doings hereon, and the bond you shall take, you are to make return to our said justice, on or before the said day of at o'clock. Witness *I. S.* our said justice at *B.* in said county, this day of *Anno Domini*, 17 *I. S.*

N<sup>o</sup>. VI.

No. VI.

*Form of a Writ of Return, in Replevin before a Justice of the Peace.*

COMMONWEALTH OF MASSACHUSETTS.

*S. L.* *S. ss.*  
To the sheriff of our county of *S.---*, or his deputy,

GREETING.

WHEREAS *P. D.* of *B.* in our county of *S.* (*addition*) lately replevied the beasts following, [*Here insert such description of them as they had in the writ of replevin*] which *S. P.* of *B.* in our county of *S.* (*addition*) had unlawfully taken and unjustly detained, as the said *P. D.* suggested, and caused the said *S. P.* to be summoned before *I. S.* one of our justices of the peace, for our said county of *S.* to answer unto the said *P. D.* for such supposed unlawful taking and detaining, at a day now passed: and whereas upon the day of at *B.* aforesaid, upon a hearing of the cause of taking and detaining the said beasts, before our said justice, it appeared that the same taking and detaining was lawful and justifiable: whereupon it was then and there considered, that the same beasts be returned, and restored to the said *S. P.* irrepleviable, and that the said *S. P.* recover against the said *P. D.* the sum of *shillings* damages, for his taking the same, by the said process of replevin, and the further sum of for his costs, arisen in the defence of the said suit, as by the record of our said justice, before him remaining, to us appears; whereof execution remains to be done: WE command you therefore, that you forthwith return and restore the same beasts unto the said *S. P.* And also that of the money of the said *P. D.* or of his goods or chattels, within your precinct, at the value thereof in money, you cause to be levied, paid and satisfied unto the said *S. P.* the aforesaid sums, being in the whole, with *one shilling* and *six pence* more, for this writ, together with your own fees; and for want of such money, goods or chattels of the said *P. D.* to be by him shewn unto you, or found within your precinct, to the acceptance of said *S. P.* for satisfying the aforesaid sums:—WE command you to take the body of the said *P. D.* and him commit unto our gaol in *B.* And we command the keeper thereof accordingly, to receive the said *P. D.* into our said goal, and him safely to keep until he pay the full sums above mentioned, with your fees, or that he be discharged by the said *S. P.* the creditor, or otherwise by order of law. Hereof fail not, and make return of this writ, with your doings therein, unto our said justice, within sixty days next coming. Witness our said justice at *B.* the day of in the year of our Lord, *I. S.*

Writ of return.

## No. VII.

N<sup>o</sup>. VII.

*Form of the Writ of Withernham from a Justice of the Peace.*

## COMMONWEALTH OF MASSACHUSETTS.

(S.L.) S——— ss.  
To the sheriff of our county of S———, or his deputy,

GREETING.

Writ of withernham.

WHEREAS P. D. of B. in our county of S. (addition) lately replevied the beasts following, viz. [here insert such description of them as they had in the writ of replevin] and which were at the time of the replevy, of the value of which S. P. of B. aforesaid, had unlawfully taken and detained, as the said P. D. suggested, and caused the said S. P. to be summoned before I. S. one of our justices of the peace for our said county of S. to answer unto the said P. D. for such supposed unlawful taking and detaining, at a day now passed : And whereas upon the day of at B. aforesaid, upon a hearing of the cause of taking and detaining the said beasts, by our said justice, it was determined, that the same taking, and detaining, was lawful and justifiable : whereupon it was then and there considered, that the beasts be returned and restored to the said S. P. irrepleviable, and for his damages and costs ; and afterwards, on the day of our writ of return and restitution issued, in due form of law, directed to the sheriff of our said county of S. or his deputy, to return the same accordingly : which writ of return and restitution was delivered to C. D. to execute accordingly ; who, on the day of returned thereon, that [here insert the return made by the officer, of his inability to return the beast] And we being desirous that the said P. D. should not by his false suggestions and pretensions, any longer detain the beasts, so by him replevied as aforesaid—command you forthwith to take the beasts of the said P. D. of like kind and value, if any he hath to be found in your precinct, in withernham, and in default thereof, any other of his goods and chattels, to the full value, in withernham, and them deliver unto the said S. P. to be by him kept, used and improved, until the said P. D. shall restore him the beasts he took from him, by our writ of replevin as aforesaid ; and also that of the money of the said P. D. or of his goods or chattels, to be found within you precinct, at the value thereof in money, you cause to be paid and satisfied unto the said S. P. three shillings for this writ, together with your own fees, for executing the same. Hereof fail not, and make return of this writ, with your doings herein, unto our said justice, within sixty days next coming.

Witness our said justice, at B. the day of in the year of  
our Lord, I. S.

## No. VIII.

N<sup>o</sup>. VIII.

*Proclamation to Rioters.*

## COMMONWEALTH OF MASSACHUSETTS.

Form.

By virtue of an act of this commonwealth, made and passed in the year of our Lord one thousand seven hundred and eighty-six, entitled, "An act for suppressing routs, riots, and tumultuous assemblies and the evil consequences thereof," I am directed to charge and command, and I do accordingly charge and command all persons, being here assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains inflicted by the said act.

GOD save the COMMONWEALTH.

# TABLE

OF THE STATUTES QUOTED AND REFERRED TO IN VOL. III.....PART II.

Shewing the time the several statutes were enacted, and thereby enabling the reader the more readily to refer to them in our statute books.

		<i>Date of the Act.</i>	<i>Subject of the Act.</i>
1780.	CHAPTER 47	May 18, 1781	Audita Querela.
1782.	CHAPTER 14	July 3, 1782	Sessions.
	21	October 19, "	Recognizances.
1783.	CHAPTER 12	July 10, 1783	Recognizances.
	38	March 10, 1784	Gurdians.
	39	" " "	Wharves, &c.
	42	" 11, "	Justices of the Peace,
	44	" 12, "	Sheriffs.
	60	" 17, "	Registry of Deeds.
1784.	CHAPTER 41	February 21, 1785	Prisoners.
1785.	CHAPTER 53	" 24, 1786	Common Fields.
1786.	CHAPTER 13	July 4, 1786	Limitation of Actions,
	21	" 7, "	Referees.
	38	October 28, "	Routs.
	52	February 13, 1787	Personal Actions,
	55	" 15, "	Probate Bonds.
	66	" 26, "	Review.
1788.	CHAPTER 11	June 18, 1788	Review.
	47	February 9, 1789	Review.
	65	" 14, "	Impounding.
	66	" " "	Executors, &c,
1789.	CHAPTER 11	June 22, "	Referees.
	14	" 14, "	Referees.
	19	" 25, "	Schools.
	26	" 24, "	Replevin.
	35	February 20, 1790	Replevin.
1790.	CHAPTER 41	March 10, 1791	Replevin.
1791.	CHAPTER 12	June 18, "	Registry of Deeds,
	17	" " "	Review.
	42	March 3, 1792	Appeals.
	45	" 6, "	Appeals.
	53	" 8, "	Criminal Prosecutions,
	58	" " "	Lord's Day.
1792.	CHAPTER 17	June 28, "	Coroners.
	41	February 25, 1793	Pleading.
	69	March 22, "	Pleading.

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1793.	CHAPTER 34	February 11, 1794	Settlements.
1794.	CHAPTER 53	" 27, 1795	Sheriffs.
1795.	CHAPTER 30	" 3, 1796	Sheriffs.
	68	" 26, "	Sheriffs.
1797.	CHAPTER 50	" 17, 1798	Absent Defendants.
1798.	CHAPTER 33	June 29, "	Profaneness.
1799.	66	February 28, 1800	Schools.
1802.	CHAPTER 11	June 23, 1802	Schools.
1804.	CHAPTER 143	March 16, 1805	Robbery, &c.
1805.	CHAPTER 97	" 13, 1806	Rape.
	99	" " "	Sheriffs' Bonds.

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	<b>Abington v. Boston</b>	1154	<b>Livermore v. Bagley</b>	1172
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	<b>Berry v. Ripley</b>	1119	<b>Monuma Prop. of v. Rogers</b>	1038
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